

DEPARTMENT OF STATE REVENUE
FIRST SUPPLEMENTAL LETTER OF FINDINGS
NUMBER 14-98004SFA
SPECIAL FUEL TAX FOR THE PERIOD
4TH QUARTER 1993 -- 4TH QUARTER 1994

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the *Indiana Register* and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the *Indiana Register*. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. **Special Fuel Tax--Imposition—Taxable Event**
Special Fuel Tax--Imposition—Imports—Parties Liable
Tax Administration— Special Fuel Supplier's Duties to Collect/Remit Tax

Authority: *Department of Treasury of Ind. v. Wood Preserving Corp.*, 61 S.Ct. 885 (U.S. 1941); *Superior Oil Co. v. Mississippi ex rel. Knox*, 50 S.Ct. 169 (U.S. 1930); *Standard Oil Co. v. Hawkins*, 74 F. 395 (7th Cir. 1896); 19 U.S.C. § 1484(a); 26 U.S.C. (I.R.C.) §§ 4041(a)(2)(A), 4081(a)(1), 4083(a)(3) and (b) and 4101; 26 C.F.R. (Treas. Reg.) §§ 48.4041-8(f), 48.4081-1, -2, -3(c); *Bryant v. State*, 660 N.E.2d 290 (Ind. 1995); *Associated Milk Producers, Inc. v. Indiana Dep't of State Revenue*, 534 N.E.2d 715 (Ind. 1989); *Gross Income Tax Div. v. Shane Mfg. Co.*, 191 N.E.2d 310 (Ind. 1963); *Indiana Dep't of State Revenue v. Bendix Aviation Corp.*, 143 N.E.2d 91 (Ind. 1957); *Wayne Pump Co. v. Department of Treasury*, 110 N.E.2d 284 (Ind. 1953); *Department of Treasury v. Spindler Co.*, 51 N.E.2d 363 (Ind. 1943); *Department of Treasury v. Ice Service, Inc.*, 41 N.E.2d 201 (Ind. 1942); *Dick v. Glenn*, 31 N.E.2d 1009 (Ind. 1941); *Welsh v. Kelly-Springfield Tire Co.*, 12 N.E.2d 254 (Ind. 1938); *Indiana Creosoting Co. v. McNutt*, 5 N.E.2d 310 (Ind. 1936); *Fry v. Rosen*,

189 N.E. 375 (Ind. 1934); *Indiana Dep't of State Revenue v. Hertz Corp.*, 457 N.E.2d 246 (Ind. Ct. App. 1983); *Reynolds Metals Co. v. Indiana Dep't of State Revenue*, 433 N.E.2d 1 (Ind. Ct. App. 1982); *Indiana Dep't of State Revenue v. Martin Marietta Corp.*, 398 N.E.2d 1309 (Ind. Ct. App. 1979); *Marhoefer Packing Co. v. Indiana Dep't of State Revenue*, 301 N.E.2d 209 (Ind. Ct. App. 1973); *Storm, Inc. v. Indiana Dep't of State Revenue*, 663 N.E.2d 552 (Ind. Tax 1996); *First Nat'l Leasing and Fin. Corp. v. Indiana Dep't of State Revenue*, 598 N.E.2d 640 (Ind. Tax 1992); *Monarch Beverage Co. v. Indiana Dep't of State Revenue*, 589 N.E.2d 1209 (Ind. Tax 1992); *Wechter v. Indiana Dep't of State Revenue*, 544 N.E.2d 221 (Ind. Tax 1989), *aff'd and adopted* 553 N.E.2d 844 (Ind. 1990); IC § 6-2.1-2-8; IC §§ 6-6-1.1-201 to -207; IC §§ 6-6-2.5-1, -7, -13, -14, -16, -16.1, -17, -19, -20, -22, -23, -24, -25, -28, -32(d), -35, -40, -41(b) and (f), -62 and -66; IC §§ 6-8.1-1-1, -1-6 and -3-1(a); IC §§ 26-1-1-103, -1-201(32) and (33), -2-106(1), -2-308(a), -2-326(1)(b) and -2-401(2); 45 IAC §§ 10-1-12, -3-10

As to five customers whose transactions the Department examined, the taxpayer alleges that although its records show the subject fuel was destined for Indiana, records provided by those customers show that it was delivered elsewhere. The taxpayer alleges that it is not liable for special fuel tax on fuel sold from its out-of-state terminals to five of its customers and shown on the taxpayer's records as destined for Indiana, but that the customers' respective records show never entered Indiana.

The Department *sua sponte* raises the following related questions:

- A. What is the taxable event under IC ch. 6-6-2.5?
- B. Did the taxpayer have to precollect and remit tax pursuant to IC § 6-6-2.5-35(j) throughout its audit period on special fuel withdrawn from its out-of-state terminals and destined for Indiana?
- C. Who was the party to each transaction responsible for paying the tax?

II. **Special Fuel Tax—Imposition—Exports**

Tax Administration— Special Fuel Supplier's Duties to Collect/Remit Tax

Authority: *Indiana Dep't of State Revenue v. Bendix Aviation Corp.*, 143 N.E.2d 91 (Ind. 1957); IC §§ 6-6-2.5-10, -20, -28, -30(a)(1), -35(a) and (c), -40(f) and -64(d); IC § 6-8.1-5-1(b); 45 IAC § 10-3-1

Taxpayer also contends that it should not be assessed special fuel tax that it failed to collect on certain in-state sales of special fuel to several of its customers that they allegedly exported, as purportedly shown by either its own or its customers' records.

III. **Special Fuel Tax—Imposition—Payment of Tax by Purchasing Supplier**
Special Fuel Tax—Imposition— Intra-Terminal Bulk Transfers

Authority: 26 U.S.C. (I.R.C.) § 4101; 26 C.F.R.(Treas. Reg.) § 48.4081-1; IC §§ 6-6-2.5-20, -28, -35(a) and (c); IC § 6-8.1-5-1(b)

The taxpayer contends that one customer paid the tax instead on the fuel forming the subject of the alleged export transactions between them.

IV. **Tax Administration—Penalties--Special Fuel Tax Law**

Authority: IC §§ 6-6-2.5-63(d) and -64(d); IC § 6-8.1-10-2.1(b) and (d); 45 IAC § 15-11-2(b) and (c)

Lastly, the taxpayer argues that it should not be assessed a penalty in light of its compliance and payment histories and its cooperation in the original and first supplemental audits.

SUMMARY OF FINDINGS

The taxpayer's protest is denied as to Issue III and sustained in part and denied in part as to Issues I, II and IV, as discussed below.

STATEMENT OF FACTS

A. Introduction—The Taxpayer, Its Customers and the Terminals

1. The Taxpayer

The taxpayer, an out-of-state corporation doing business in Indiana, markets petroleum products nationwide, including at retail. During the audit period (from October 1, 1993 to December 31, 1994) it held (and as of the date of this letter still holds) an Indiana special fuel supplier's license. By virtue of that status the Department will also refer to the taxpayer in this letter of findings as "the supplier." On September 15, 1994, late in the audit period, the taxpayer completed and mailed to the Department a Tax Precollection Agreement Application (Form SF-10A). On that form the supplier elected option 1, "agree[ing] to treat all out-of-state terminal removals of undyed special fuel, for export into Indiana, as if they were received in Indiana, and [to] collect the Indiana special fuel tax from every purchaser." *Id.* The Department's then Special Tax Division (at this writing called the Fuel and Environmental Tax Division) received this Form SF-10A on September 22, 1994. The taxpayer has not changed its election as of the date of this letter of findings.

2. The Taxpayer's Customers

The audit adjustments to the supplier's special fuel tax liability that underlie Issues I—III of this letter of findings include assessments on fuel forming the subject of certain transactions between the taxpayer and five of its customers. Because each of these customers is also a special fuel taxpayer whose identity is confidential information under IC § 6-8.1-7-1(a), the Department will refer to them below as Customers A, B, C, D and E. The principal places of business of Customers A, B and D are all located outside Indiana; those of Customers C and E are located in Indiana.

Customers A and C—E held various licenses during all or parts of the taxpayer's audit period that the Department had issued to them incident to their respective special fuel activities. Of these customers, the only ones whose licensing status is relevant to the present protest are Customers A, C and D, all of which held exporter's licenses throughout the audit period. Customer A also held a permissive supplier's license throughout the taxpayer's audit period and obtained a supplier's license in January, 1995, immediately after the end of that period. In addition, Customer A's exporter's and permissive supplier's license applications to the Department indicate that throughout the taxpayer's audit period Customer A was registered with respect to its petrochemical operations with the Internal Revenue Service (hereafter "the IRS"). Lastly, Customer A also represented on those applications that during the taxpayer's audit period Customer A was not operating any terminal in Indiana, and did not list the Indiana terminal involved in this audit as one in which it was leasing any space.

3. The Terminals

Each special fuel transaction occurred at one of four terminals. Again, in order to preserve the confidentiality of the parties' identities, the Department will refer to these terminals below as Terminals 1, 2, 3 and 4. Terminal 1 is located in an Indiana county bordering an adjoining state (hereafter "the adjoining state"). Terminals 2 and 3 are located in the adjoining state in a county bordering Indiana (hereafter "the adjoining county") and the Indiana county in which Terminal 1 is located. Terminal 4 is located in a county that forms part of the greater metropolitan area of a large city in a third state, on the opposite side of the adjoining state from Indiana. The supplier owned and operated Terminals 1 and 2 during the audit period. The Petroleum Terminal Encyclopedia's section for the adjoining state lists Customer A as being Terminal 3's owner and operator. The taxpayer maintained fuel inventory positions in all four terminals during the audit period.

B. The Taxpayer's and Customers' Course of Dealing

Terminals 1 through 3 were and are easily accessible to the five customers' primary geographical markets. Those markets all included final delivery points in both the adjoining state and Indiana. It was common practice during the audit period for all the customers where necessary to fill their respective delivery orders, to import fuel into

Indiana withdrawn from the terminals in the adjoining county and state. Customer A withdrew the fuel it imported mainly from both Terminals 2 and 3, but occasionally from Terminal 4. However, Customer E withdrew all the fuel it bought that was assessed as imported from Terminal 4. All the other customers made their withdrawals for import only from Terminal 2. It was also common practice for all the customers, where necessary, to export fuel withdrawn from Terminal 1 to the adjoining state.

The document for each shipment of fuel, which the taxpayer generated at the dispensing terminal's rack and issued to the driver picking up the fuel for the customer in question, was entitled "Truck Bill of Lading or Receipt for Delivery by [supplier]." Each such document identified the customer as "Consignee" and stated below the title in capital letters that "[i]f this document evidences a delivery into shipper's truck or into consignee's truck, it is not a bill of lading, but consignee's receipt for the delivery." The freight terms on each document were "[c]ollect." All five customers picked up their purchases with trucks that they owned or hired. Customer A used a common motor carrier to pick up its purchases and Customer E used a common motor carrier to make deliveries to one of its customers. However, Customers B—D, and Customer E as to its sales to its other customers, all took delivery of the fuel at the dispensing terminal in their own transport trucks. The taxpayer invoiced each customer for payment for the special fuel withdrawn from a terminal contemporaneously with each respective withdrawal.

The supplier gave its customers standardized sets of terminal origin codes and wholesale identification codes ("WICs") to use in withdrawing fuel from Terminals 1—4. The driver picking up the fuel for the customer in question would enter at the dispensing terminal's rack the terminal's origin code and the WIC corresponding to the destination into the taxpayer's automated system for tracking special fuel withdrawals. That system would then generate a shipping document showing an origin and a destination for the fuel consistent with the codes that the driver had entered. The supplier also prepared, and maintained as part of its business records, periodic reports of the respective number of gallons of special fuel that each of its customers withdrew for interstate shipment.

C. The Original Audit

1. Summary of Substantive Adjustments in Issue

The Department conducted a census (*i.e.*, transaction-by-transaction) field audit of the supplier's special fuel tax liability for the above audit period. It also conducted a supplemental audit incident to the Department's issuing its original Letter of Findings, discussed below. As a result of these audits, the Department made the adjustments to the supplier's special fuel tax liability that form the subject of Issues I—III of the present letter of findings. The field auditor described these adjustments in the Audit Summaries as being "unreported imports by customers" and "disallowed exports sold to licensed & unlicensed exporters" (hereafter "unreported imports" and "disallowed exports," respectively).

2. Records Reviewed and Facts Disclosed

The spreadsheets in the Audit Summaries that itemize these adjustments, and the supporting workpapers, show that the responsible field auditor examined the taxpayer's interstate shipment reports and the WICs appearing in them, invoices, receipts and bills of lading. Viewed collectively, this evidence indicates that each transaction underlying these assessments had two facts in common. First, the supplier had obtained a receipt from or issued a bill of lading to the driver who accepted the fuel, or issued an invoice to the customer, that showed an Indiana destination for the subject fuel. (The field auditor assessed no tax on certain withdrawals for which the taxpayer was able to provide the auditor with shipping documents showing destinations in the adjoining state.) Second, the taxpayer had failed to collect special fuel tax from the customer at the rack of the dispensing terminal.

3. The Unreported Imports Adjustment

The auditor assessed as being unreported imports all withdrawals of fuel from Terminals 2—4 by Customers A—E for which the taxpayer's interstate shipment reports showed an Indiana WIC. The Audit Summaries cite IC §§ 6-6-2.5-20 and -35(j) and the supplier's election under the latter statute as support for this adjustment. However, as already noted above, it was not until September 22, 1994 that the Department received the taxpayer's election on its Form SF-10A to treat all out-of-state terminal removals destined for Indiana as if received here. Notwithstanding this fact, this adjustment included not only all such transactions occurring on or after September 22, 1994, but also those that occurred before that date.

4. The Disallowed Exports Adjustment

The auditor also disallowed as exports, and assessed tax on, all withdrawals from an Indiana origin code (*i.e.*, Terminal 1) to a customer with an Indiana WIC code, but which the supplier had erroneously reported as exports on its returns. The auditor noted in the Audit Summaries that the taxpayer's return preparer had reported exports for certain customers based solely on the fact that the customers had exporter licenses. The sales assessed as being disallowed exports were made to Customer A in December, 1993 and to Customers B—E in 1994.

5. The Negligence Penalty Adjustment

The field auditor further recommended to the Department's Audit Division that it assess the supplier, and the Audit Division did assess, a 10% negligence penalty, which is the subject of Issue IV. It did so because of reporting and recordkeeping omissions by the taxpayer that made the adjustments underlying Issues I—III necessary, as well as other adjustments for which the supplier paid the resulting parts of the assessments during the original protest.

D. The Protest's Procedural History

1. The Original Protest

a. Review and Analysis of Evidence Submitted in the Original Protest

The taxpayer timely protested the assessments resulting from the original audit and raised a variety of issues, including the issues remaining on this rehearing. While the protest was pending the taxpayer submitted, among other additional evidence, invoices and fuel receipts documenting its transactions with Customer A at Terminal 1. None of the invoices show collection of any state special fuel tax, and the invoices also show that the taxpayer reduced the payment by the respective amounts of the federal fuel manufacturer's excise tax and the federal Superfund charge. Each of the invoices and fuel receipts identify Terminal 1 as being the facility from which the shipment in question originated and that Customer A picked up the shipment in equipment that it owned or for which it provided. There is no language on any of these documents indicating that any of the subject fuel was being exported from the state.

b. Summary of the Original Letter of Findings

The Protest Review Board of the Department's Audit Division (hereafter "the Audit Division Protest Review Board" or "the Board") issued a letter of findings sustaining the protest in part and denying it in part. The Board sustained the protest to the extent that the taxpayer was able to produce further records that Customers C and D had exported from Indiana special fuel on which uncollected tax had been assessed. Those transactions were removed from the assessments in the supplemental audit, and are no longer in issue.

However, in that letter the Audit Division Protest Review Board also denied the parts of the supplier's protest based on the issues set out at the beginning of this letter. As the auditor had done, the Board cited IC §§ 6-6-2.5-20 and -35(j) and the supplier's election under the latter statute as support for the unreported imports adjustment, and also cited IC §§ 6-6-2.5-40(b) and -65(a) as originally enacted in further support. The Board also denied the taxpayer's protest of the assessment of the negligence penalty, finding that the supplier had been negligent.

2. The Rehearing Request

The taxpayer timely requested and was granted a rehearing as to these rulings before the Legal Section of the Department's Fuel and Environmental Tax Division. The Department later transferred the rehearing to its Legal Division.

F. Review and Analysis of Evidence Submitted on Rehearing

1. Summary of Evidence

In this rehearing, as evidence that it does not owe these assessments, the taxpayer has submitted three affidavits, photocopies of shipping papers and invoices that it issued to, and of documents purporting to be business records of, Customers A—E.

2. Affidavits of Customers A and B

a. Form of the Affidavits

Individuals who purportedly worked for Customers A and B, respectively, signed the three affidavits, submitted at or after the rehearing. Each affidavit states that the signing employee had reviewed their respective companies' business records concerning the purchases of special fuel on which the Department had assessed tax against the supplier.

b. Customer A's First Affidavit and Supporting Exhibits

Customer A's first affidavit stated that the Department examined the transactions between it and the taxpayer in a previous special fuel tax audit of Customer A covering the same period as the supplier's. It further states that because of that audit the Department had concluded that Customer A had paid the taxes on the fuel forming the subject of those transactions. The Department did audit Customer A, which paid the resulting assessment. However, the Department's review of Customer A's audit file establishes that the responsible auditor (not the present taxpayer's auditor) sampled its fuel transactions only for November 1993 and June 1994. That audit was not a census audit such as those that the Department performed on the present supplier. Moreover, the main focus of Customer A's audit was on sales it made to another purchaser in another bordering state, and to that extent Customer A's audit was in no way connected with the present taxpayer. Customer A's contact employee during its audit was the same employee who signed Customer A's first affidavit supporting the present taxpayer's rehearing.

The two attachments to Customer A's first affidavit did not establish its payment of the tax on the subject fuel. The first attachment was a spreadsheet that itemizes Customer A's unreported imports, purchased from Terminal 2 and from the supplier's stock in Terminal 3. The Department presumes that Customer A prepared this document for purposes of this rehearing. The second was copies of pages of a computer printout entitled "Special Fuel Dealer's Special Fuel Receipt Schedule: In-State Purchases and Imports" on which certain transactions between the present taxpayer and Customer A are listed. That printout was attached to the present taxpayer's Schedule 7b, "Gallons Sold to Licensed Exporters for Export to State of [the adjoining state]," which was in turn attached to its December, 1993 "Special Fuel Supplier's Monthly Tax Return" (Form SF-101). Neither attachment is a source business record of Customer A evidencing payment

of any tax by it. Nor does Customer A's first affidavit refer to any such records that might have been submitted during the supplier's original audit or earlier in its protest.

c. Customer A's Second Affidavit and Related Evidence

Customer A's second affidavit (signed by a different employee than the one who signed the first affidavit) states that Customer A paid fuel tax to the adjoining state on its unreported imports and to Indiana on its disallowed exports. To support these new assertions, the taxpayer has had Customer A submit photocopies of computer printouts entitled "Monthly Motor Fuel Tax Report" for the adjoining state for the months of November, 1993 through November, 1994 inclusive. (Customer A's second affidavit states that it could not locate the December, 1994 report.) The taxpayer also had Customer A submit a copy of its Indiana Permissive Supplier's Monthly Special Fuel Tax Return (Form SF-201) for December, 1993, the month in which the transactions involving all of its disallowed exports occurred, with supporting schedules and computer printouts. That documentation includes a Schedule 5x (Fuel Received From a Licensed Supplier Through an Exchange Transaction for Delivery in Indiana) and supporting computer printout. Lastly, the taxpayer again tendered a copy of the pages of the printout of exports from Terminal 1 during December, 1993 that it had previously submitted with Customer A's first affidavit and on which the taxpayer's transactions with Customer A appeared.

The Department has reviewed this latter group of documents and compared them to the taxpayer's Audit Summary. That analysis shows that Customer A delivered most (but not all) of the fuel withdrawn from Terminals 2 and 3 during the time the taxpayer had elected to collect and remit, and on which the field auditor had assessed, Indiana special fuel tax, to destinations in the adjoining state. Similarly, Schedule 5x of Customer A's December, 1993 Form SF-201 and that schedule's supporting computer printout represents that most (but not all) of the fuel assessed in the taxpayer's audit as disallowed exports was the subject of exchange transactions.

d. Customer B's Affidavit and Related Evidence

Customer B's affidavit says that Customer B delivered all the fuel it bought from the taxpayer on which it was assessed tax to locations in the adjoining state. In contrast to Customer A's first affidavit, Customer B's affidavit both refers to copies of the latter's business records that the supplier tendered earlier and has attached to it copies of other business records of Customer B. Those records show that it in fact delivered the taxpayer's disallowed exports bought from Terminal 1, and its alleged unreported imports bought from Terminal 2, to locations in the adjoining state. The copies of Customer B's business records with respect to the unreported imports are copies of the manifests that its drivers filled out. All but a handful of these manifests recite both a delivery site in the adjoining state and the number that the supplier issued as evidenced on its own fuel receipt.

3. Evidence of Transactions with Customers C—E

a. Taxpayer's Records

The taxpayer did not submit any affidavits from Customers C, D or E. It did submit copies of certain of its own fuel receipts and invoices issued from Terminal 1 with respect to Customer C during the audits, and with respect to Customer D in connection with the rehearing. The words “[e]xport to [the adjoining state]” or “[e]xport from Indiana” appear on each of these documents. The Department in the original protest abated the assessments on any fuel forming the subject of other fuel receipts issued to Customers C and D on which this language appeared.

b. Copies of Customers C—E's Records

The supplier also submitted photocopies of documents purporting to be business records of Customers C—E for which the taxpayer did not produce copies of its corresponding bills of lading or fuel receipts. These copies were of invoices of these customers, or in the case of Customer E of three of its customers and of the common motor carrier (which was also one of those customers) that Customer E employed to make some of its deliveries. All of these copies show the destination of the fuel, as to all five customers, as being to cities in states other than Indiana, usually in the adjoining state. Some do not show any street address. Customer E and its common carrier made deliveries from Terminal 4 to its three customers at addresses in the city in the third state. That city and state are two states away from Indiana and in roughly the opposite direction from Customer E's shipping address and principal place of business in Indiana as measured from Terminal 4.

4. The Taxpayer Submitted No Evidence on the Negligence Issue.

There is nothing in the evidence explaining why the supplier failed to collect special fuel tax from these five customers.

I. Special Fuel Tax--Imposition—Taxable Event

Special Fuel Tax--Imposition— Unreported Imports—Parties Liable

Tax Administration— Special Fuel Supplier's Duties to Collect/Remit Tax

DISCUSSION

A. INTRODUCTION

The current Special Fuel Tax Law, P.L. 277-1993(ss), sec. 44, 1993 Ind. Acts 4555, 4734-4757 (hereafter “the Special Fuel Tax Law of 1993” or “the Special Fuel Tax Law”) is codified as amended at IC ch. 6-6-2.5 (1993 and Supp. 1997). It took effect October 1, 1993, at the beginning of the supplier's audit period. Both IC §§ 6-6-2.5-66 and 6-8.1-1-1 make the new special fuel tax a “listed tax,” which IC § 6-8.1-3-1(a) makes

the Department primarily responsible to administer, collect and enforce. Amendments to certain sections of IC ch. 6-6-2.5 took effect July 1, 1994, which the General Assembly made by enacting P.L. 18-1994, secs. 12-37, 1994 Ind. Acts 423, 434-455 (hereafter “the 1994 amendments” or “the amendments”). As the Department will explain below, the amendments apply to this protest as to certain events that occurred after July 1, 1994.

B. THE SPECIAL FUEL TAX IS AN EXCISE TAX.

The General Assembly used the term “license tax” in IC § 6-6-2.5-28(a), which is part of the tax imposition section of the Special Fuel Tax Law of 1993, to describe the new special fuel tax. The Department administratively construes “license tax” as being a technical term “ ‘having a peculiar and appropriate meaning in law [that must] be understood according to [its] technical import.’ ” See *Indiana Dep’t of State Revenue v. Colpaert Realty Corp.*, 109 N.E.2d 415, 418-19 (Ind. 1952) (quoting a predecessor to current IC § 1-1-4-1(1) (1993); bracketed material substituted by the Department). The technical meaning of “license tax” presumably derives from *Fry v. Rosen*, 189 N.E. 375 (Ind. 1934) (hereafter “*Rosen*”), the only Indiana opinion that the Department has found that construes a comparably structured statute. In that opinion the Indiana Supreme Court had to decide, among other issues, whether a charge described in that statute as a “license fee” for importing alcoholic malt beverages was an import duty or impost. Under the statute the importing agents, whom the state was to issue permits, were to become liable for the “license fee” upon the sale in Indiana, or withdrawal from their respective plants for sale in Indiana, of such beverages. The court characterized the “license fee” as being “obviously a special excise tax imposed upon importing agents for the privilege of doing business as vendors of alcoholic malt beverages and measured by the amount of sales.” *Id.* at 378-79.

Accordingly, the Department administratively construes the term “license tax” in IC § 6-6-2.5-28(a) as meaning that the Special Fuel Tax Law of 1993 created an excise tax. See *Rosen*, 207 Ind. at 418, 189 N.E. at 378. Indiana law defines an “excise tax” as “one which is imposed upon the performance of an act or the enjoyment of a privilege.” *Bryant v. State*, 660 N.E.2d 290, 297 (Ind. 1995). The special fuel tax is imposed on all persons (as defined in IC § 6-6-2.5-17), including the present taxpayer, for the privilege of engaging in the business of selling such fuel in Indiana. It is also imposed on any act constituting “receipt” of special fuel incident to that business, as IC § 6-6-2.5-20, discussed below, defines “received.” In addition, the tax is also imposed on all persons who buy special fuel from any persons making special fuel sales. The tax is measured by the amount of fuel sold, analogously to the tax that was at issue in *Rosen*. See 189 N.E. at 379. The specific measure that the present law uses is “invoiced gallons of nonexempt special fuel received[.]” IC § 6-6-2.5-28(c). IC § 6-6-2.5-14 as originally enacted defined “invoiced gallons” as “the gallons billed on an invoice on payment to a supplier.” 1993 Ind. Acts at 4736. (The 1994 amendments inserted the word “accurately” between the words “gallons” and “billed.” 1994 Ind. Acts at 434.)

C. SCOPE OF THE SPECIAL FUEL TAX

Throughout the taxpayer's audit period IC § 6-6-2.5-28(a) and (b) read as follows:

6-6-2.5-28 License tax; presumptions; computation; liability for collection and remittance; sulfur content; penalty

(a) A license tax of sixteen cents (\$0.16) per gallon is imposed on all special fuel sold or used in producing or generating power for propelling motor vehicles [as such fuel is defined in IC § 6-6-2.5-22(1)] except fuel used under section 30(a)(8) of this chapter. The tax shall be paid at those times, in the manner, and by those persons specified in this section and section 35 of this chapter.

(b) The department [of state revenue, as defined in IC § 6-6-2.5-7] shall consider it a rebuttable presumption that all undyed or unmarked special fuel, or both, received in Indiana ["received" being defined in IC § 6-6-2.5-20, as the Department will discuss below,] is to be sold for use in propelling motor vehicles [as defined in IC § 6-6-2.5-16].

1993 Ind. Acts at 4738 (bracketed material added by the Department).

The tax is imposed on undyed "special fuel sold or used in producing or generating power for propelling motor vehicles[.]" IC § 6-6-2.5-28(a). This language describes the same kind of special fuel as that described in the part of the definition of "special fuel" set out in IC § 6-6-2.5-22(1), *i.e.* special fuel "suitable for the generation of power in an internal combustion engine or motor[.]" *Id.* This definition includes diesel oil suitable to fuel highway vehicles. *See* 26 U.S.C. (I.R.C.) § 4083(a)(3) (1988 and Supp. V 1993) (defining "diesel fuel" in part as "any liquid (other than gasoline) which is suitable for use as a fuel in a diesel-powered highway vehicle[.]") The Department therefore administratively construes the phrase "special fuel sold or used in producing or generating power for propelling motor vehicles" in IC § 6-6-2.5-28(a) as describing the primary kind of special fuel that is subject to the tax, *i.e.* special fuel that is suitable for the purposes described. However, the phrase also describes two of the acts involving special fuel at which the tax is aimed. One of those acts is "*use*[] in producing or generating power for propelling motor vehicles[.]" *id* (emphasis added), *i.e.* "the delivery or placing of special fuel into the fuel supply tank of a motor vehicle." 45 IAC § 10-1-12 (1992 and 1996). The other, which will be of some importance in deciding this protest, is "sale" of special fuel for ultimate delivery or placement in fuel supply tanks of motor vehicles in order to produce or generate power for propelling them. (The Department will discuss what constitutes a sale of special fuel below, when it discusses the taxpayer's argument concerning the unreported imports by customers.)

However, IC § 6-6-2.5-28(a) does not defer imposition and collection of the tax until such sales or end use actually occur, nor does it standing alone describe all of the acts

involving special fuel that are subject to tax. IC § 6-6-2.5-28(b) makes it a rebuttable presumption “that all undyed or unmarked special fuel, or both, *received* in Indiana is to be sold for use [as defined in 45 IAC § 10-1-12] in propelling motor vehicles[.]” *id* (emphasis added), and by implication subject to tax under IC § 6-6-2.5-28(a). *Accord*, 45 IAC § 10-3-10(a) (1992 and 1996) (stating that “[a]s a general rule, all special fuel acquired by a nonlicensed person is presumed to be acquired for the operation of a motor vehicle[.]”). As the Department will explain below in responding to the taxpayer’s argument, the primary taxable event under the Special Fuel Tax Law occurs when nonexempt special fuel is “received” as IC § 6-6-2.5-20 defines that word. That definition now treats special fuel that is subject to an agreement or election under IC § 6-6-2.5-35(j) as also having been received in Indiana. Simply stated, special fuel is received whenever a transfer of such fuel occurs outside what is called the “bulk transfer/terminal system,” also discussed below. It will be apparent from that discussion that the various acts that IC § 6-6-2.5-20 describes as a receipt of special fuel must necessarily occur before retail sale or actual consumption of the fuel.

Moreover, unlike IC § 6-6-2.5-28(a), IC § 6-6-2.5-20 permits the receipt of special fuel for purposes in addition to, although related or calculated to lead to, sale for use or use in a motor vehicle. Specifically, the Department construes the prepositional phrase “for consumption, use, sale or warehousing” in IC § 6-6-2.5-20 as qualifying each of the acts described in that section as being a receipt of special fuel. The Indiana Supreme Court interpreted a prepositional phrase in a section of the gross income tax statute as similarly qualifying several taxable acts mentioned earlier in the same section in *Indiana Creosoting Co. v. McNutt*, 5 N.E.2d 310, 315 (Ind. 1936). Thus, IC §§ 6-6-2.5-20 and -28(b) read together make it a rebuttable presumption that special fuel received for warehousing or consumption (which 45 IAC § 10-1-12 distinguishes from “use”) is also subject to imposition of tax under IC § 6-6-2.5-28(a).

The Department therefore administratively construes IC §§ 6-6-2.5-20 and -28(b) as creating a rebuttable presumption that all undyed or unmarked special fuel received (or treated under IC §§ 6-6-2.5-20 and -35(j) as if it were received) in Indiana is subject to tax under IC § 6-6-2.5-28(a). The presumption applies to every special fuel transaction qualifying as a receipt under IC §§ 6-6-2.5-20 and -35(j), regardless of whether the purpose of a receipt under IC § 6-6-2.5-20 was “for consumption, use, sale or warehousing,” *id*. The Department will only recognize an exclusion from this presumptive liability for the special fuel tax where some other provision of the Special Fuel Tax Law, or any regulations that the Department promulgates pursuant to that provision, explicitly so provides, and only to the extent there specified.

D. THE TAXABLE EVENT: THE TAXPAYER’S ARGUMENT

The taxpayer asserts that under the Special Fuel Tax Law of 1993, imports of special fuel into Indiana are taxable only if and when the fuel physically enters the state. In other words, the taxpayer views the taxable event as occurring when special fuel is brought into Indiana. Its primary support for this proposition is the term “entry into Indiana,” used IC § 6-6-2.5-20 in the definition of “received” in that section, and the term “entered into

Indiana” in IC § 6-6-2.5-28(d). (Section 25 of the 1994 amendments, 1994 Ind. Acts at 438, added the latter subsection, which imposes tax on fuel imported other than into a terminal when it is “entered into Indiana,” *id.*) In addition, the taxpayer also cites IC § 6-6-2.5-13, which defines “import,” with respect to both sellers and purchasers, as “when special fuel is delivered into Indiana from out-of-state[.]” *id.*

The taxpayer further supports its thesis by analogizing “entry into Indiana” to “entry into the United States” under I.R.C. § 4081(a)(1)(A)(iii) as defined in 26 C.F.R. (Treas. Reg.) § 48.4081-1(b) (1998), and as incorporated into IC § 6-6-2.5-28(c). The latter subsection, as revised by section 25 of the 1994 amendments, states in relevant part that “the [special fuel] tax ... shall generally be determined in the same manner as the tax imposed by Section 4081 of the Internal Revenue Code and Code of Federal Regulations.” 1994 Ind. Acts at 438. In addition, section 17 of the 1994 amendments, *id.* at 435, revised IC § 6-6-2.5-20 to read in relevant part that “[t]he definition[] of the term[] ... ‘entry’, ... shall have the same meaning[] described in the Internal Revenue Code or Code of Federal Regulations.” *Id.* As the taxpayer applies its argument to the present issue, it contends that special fuel removed from out-of-state terminals and subject to a supplier precollection agreement or supplier election under IC § 6-6-2.5-35(j) does not become taxable until it is “entered into Indiana.” In particular, it argues that the taxpayer should not have been assessed tax on the special fuel removed from Terminals 2, 3 and 4 because that fuel was never physically brought into the state.

In the case of out-of-state transactions of special fuel intended to be “ent[ered] into Indiana[.]” the argument begs the question of which party is the “enterer” of the special fuel, *i.e.* the responsible taxpayer. More importantly, the argument, taken at face value, can be read as implying that imposition and payment of the tax under that law always and only occurs upon, and cannot occur at places or times other than upon, the fuel’s “entry into Indiana.” The Department disagrees with any such implication that the taxpayer may have intended. The taxpayer’s argument takes the phrase “entry into Indiana” out of context of the rest of IC § 6-6-2.5-20 and of the Special Fuel Tax Law and overemphasizes that phrase. The Indiana Supreme Court has made it clear that “[a] statute is examined and interpreted as a whole ... without overemphasizing a strict literal or selective reading of individual words.” *Cliff v. Indiana Dep’t of State Revenue*, 660 N.E.2d 310, 316 (Ind. 1995) (citations and internal quotation marks omitted).

Viewing both IC § 6-6-2.5-20 and the Special Fuel Tax Law in their entirety, it is clear to the Department that the General Assembly intended to impose and require payment of special fuel tax at times and places, and under circumstances, in addition to “entry into Indiana.” The Special Fuel Tax Law defines a nearly comprehensive event that determines the most frequent times, places and situations upon the occurrence of which special fuel tax attaches and becomes payable. The taxpayer’s protest includes transactions that occurred at times and places and under circumstances other than upon “entry into Indiana,” and to which its argument therefore necessarily cannot apply. Identifying the statutory taxable event thus will both facilitate resolution of the protest overall and place the taxpayer’s “entry into Indiana” argument in the proper legal context.

For these reasons, the Department will first discuss that event before turning to the merits of that argument.

E. THE PRIMARY TAXABLE EVENT: WHEN SPECIAL FUEL IS “RECEIVED”

1. Introduction: The Special Fuel Tax Law’s Definition of “Received”

The Department administratively construes the primary taxable event under the Special Fuel Tax Law of 1993 as being when special fuel is “received” as IC § 6-6-2.5-20 defines that word. Section 17 of the 1994 amendments made certain changes to the original version of IC § 6-6-2.5-20, all but one of them being technical corrections to reflect federal regulatory developments, discussed below, that had been in the offing since before the Special Fuel Tax Law of 1993 was originally enacted. Those changes to IC § 6-6-2.5-20, as reflected in the session laws, read as follows:

6-6-2-5-20 “Received” defined

Sec. 20. As used in this chapter, “received” means the removal from any refinery or terminal in Indiana, or the entry into Indiana ~~from another state or a foreign country~~ of any special fuel for consumption, use, sale, or warehousing, except for transfers in bulk into or within a terminal in Indiana between registered suppliers [under I.R.C. § 4101; *see* IC § 6-6-2.5-23, which defines “supplier” and requires such registration]. The tax imposed under section 28 of this chapter **with respect to special fuel removed from terminals within Indiana and with respect to special fuel which is the subject of a tax precollection agreement pursuant to section 35(j) of this chapter**, shall be imposed at the same time and in the same manner as the [current gasoline and diesel fuel manufacturer’s excise] tax imposed by Sections 4081 to 4083 ~~and Section 4103~~ of the Internal Revenue Code [I.R.C. §§ 4081—4083]. The definitions of the terms “removal”, “entry”, and “transfers in bulk” shall have the same meanings described in the Internal Revenue Code ~~as it existed on January 1, 1992~~ **or Code of Federal Regulations**.

1994 Ind. Acts at 435 (strikethroughs for deletions and boldface for new material in session law; bracketed material inserted by the Department). With the exception of the new passage including the reference to section 35(j), also discussed below, the Department construes these updates not as changes to the original statute, but as more clearly expressing its intent. *Economy Oil Corp. v. Indiana Dep’t of State Revenue*, 321 N.E.2d 215, 219 (1974), and opinions there cited.

2. Reasons That the Primary Taxable Event Is When Special Fuel Is Received

a. The Definition of “Received” Describes Acts Consistent with an Excise Tax.

The Department has reached the conclusion that the main taxable event occurs when special fuel is received for four reasons. First, the above-quoted definition of “received” in IC § 6-6-2.5-20 describes several *acts* constituting movement and transfer of special fuel, which the Department will detail below. As previously discussed above, the Department construes the Special Fuel Tax Law as creating an excise tax, which Indiana law defines in part as “one which is imposed upon the performance of *an act*... .” *Bryant, supra*, 660 N.E.2d at 297 (emphasis added). This construction of the statute therefore makes it reasonable to read the definition of “received” as describing the acts which are taxable and which, if they occur, trigger the excise.

b. “Received” Is Used in the Imposition, Calculation and Collection Sections of the Special Fuel Tax Law.

Second, the extensive use of the word “received” in several subsections of IC §§ 6-6-2.5-28 and -35, which govern the imposition, calculation and collection of the tax, bolster the construction of “received” as defining taxable events under the Special Fuel Tax Law. As previously quoted above, IC § 6-6-2.5-28(b) presumes that all undyed or unmarked special fuel “*received* in Indiana is to be sold for use in propelling motor vehicles.” *Id* (emphasis added). In addition, during the audit period IC § 6-6-2.5-28(c) further stated in relevant part, and still states, that “the tax imposed on special fuel by subsection (a) shall be measured by invoiced gallons of nonexempt special fuel *received* by a licensed supplier in Indiana” *Id* (emphasis added). Current IC § 6-6-2.5-28(d) states in relevant part that “the tax ... on special fuel imported into Indiana, other than into a terminal, ... shall be measured by invoiced gallons *received* at a terminal or at a bulk plant.” *Id* (emphasis added). Consistent with IC § 6-6-2.5-28(c), throughout the audit period IC § 6-6-2.5-35(a) stated, and still states in relevant part, that “[t]he tax on special fuel *received* by a licensed supplier in Indiana that is imposed by section 28 of this chapter shall be collected and remitted to the state by the supplier who *receives* taxable gallons” *Id* (emphases added). Lastly, IC § 6-6-2.5-35(j), on which the field auditor and the Audit Division Protest Review Board relied as the basis for the assessments, also uses the word “received” in two places, as the Department will discuss below. Thus, if the status of the substance in question as “special fuel” under IC § 6-6-2.5-22 is not in issue, the previously quoted sections impose a threshold requirement that an act of “receipt” of such fuel must occur before tax can and must be imposed, calculated and collected.

c. Receipt Is Also the Taxable Event Under the Gasoline Tax Law.

Third, the Gasoline Tax Law, P.L. 79, sec. 1, I 1979 Ind. Acts 329, 329-52, codified as amended at IC ch. 6-6-1.1 (1993 and Supp. 1997), already makes the taxable event under that law occur when fuel is received. IC § 6-6-1.1-201 states in relevant part that “[t]he

distributor shall initially pay the tax on the billed gallonage of all gasoline the distributor *receives* in this state,” *Id* (emphasis added). IC §§ 6-6-1.1-202 to -207 enumerate the various times and places at and circumstances under which gasoline may be received. It is logical to infer from these provisions that receipt is to be the taxable event under the new Special Fuel Tax Law as well. *See* IC § 6-6-2.5-28(c) (measuring the tax by “invoiced gallons of nonexempt special fuel *received*” [emphasis added]). It is equally logical to infer that if “entry [of special fuel] into Indiana” was to be the sole taxable event under that law, it would use that term instead of “received.”

*d. The Definition of “Received” Describes Acts That Also
Trigger the Federal Fuel Manufacturers’ Excise Tax.*

(i) Introduction

Fourth, the definition of the word “received” in IC § 6-6-2.5-20 tracks in detail the taxable events under the federal gasoline and diesel manufacturer’s excise tax that I.R.C. § 4081 imposes. However, to make the relationship between the two statutes clear, it is first necessary to review the references to I.R.C. § 4081 in IC §§ 6-6-2.5-20 and -28(c) in order to show the federal statute’s role in relation to the Special Fuel Tax Law overall. The Department will then discuss I.R.C. § 4081 and the regulatory interpretation that the IRS has placed on it to point out certain similarities of those authorities to the Special Fuel Tax Law in general, and to IC § 6-6-2.5-20 in particular.

(ii) References to I.R.C. § 4081 in the Special Fuel Tax Law

As IC § 6-6-2.5-20 states, the special fuel tax imposed by IC § 6-6-2.5-28 is “imposed at the same time and in the same manner as the [gasoline and diesel fuel manufacturer’s excise] tax[es] imposed by” I.R.C. §§ 4081—4083. Of these latter three statutes, however, I.R.C. § 4081 is the one that actually imposes the federal tax. Moreover, IC § 6-6-2.5-28(c) makes IC § 6-6-2.5-20’s general reference to these three federal statutes specific by stating in relevant part that the special fuel tax is to be “imposed in the same manner as the tax imposed by Section 4081 of the Internal Revenue Code[.]” *Id*. The current version of I.R.C. § 4081(a)(1), which imposes the federal fuel manufacturer’s excise tax, is quoted in the next paragraph. Congress revised I.R.C. § 4081(a)(1) into substantially its current form when it enacted the Revenue Reconciliation Act of 1990 (Omnibus Budget Reconciliation Act of 1990, Title XI), Pub. L. No. 101-508, § 11212(a), 104 Stat. 1388-400, 1388-430. The federal tax originally applied only to gasoline; Congress did not extend that tax to diesel fuel until it enacted the Revenue Reconciliation Act of 1993 (Omnibus Budget Reconciliation Act of 1993, Title XIII), Pub. L. 103-66, § 13242(a), 107 Stat. 416, 514-18, which occurred after passage of the Special Fuel Tax Law. (Congress has not further amended I.R.C. § 4081(a)(1) (1994) as of this writing.) However, Congress has not changed the *taxable events* set out in I.R.C. § 4081(a)(1) (e.g., removals from refineries and terminals and entries into the United States) since it passed the 1990 act. It is thus clear that the references to the time and manner of imposition of the federal tax in IC §§ 6-6-2.5-20 and -28(c) indicate that the

latter statutes are not focused on fuel type, but on acts taken with respect to that fuel, *i.e.* its movement and transfer.

(iii) I.R.C. § 4081(a)(1) and IRS Development of
Regulations Interpreting It

I.R.C. § 4081(a)(1) reads as follows:

§ 4081. Imposition of tax

(a) Tax imposed

(1) Tax on removal, entry or sale

(A) In general

There is hereby imposed a tax at the rate specified in paragraph (2) on--

- (i) the removal of a taxable fuel from any refinery,
- (ii) the removal of a taxable fuel from any terminal,
- (iii) the entry into the United States of any taxable fuel for consumption, use, or warehousing, and
- (iv) the sale of a taxable fuel to any person who is not registered under [I.R.C.] section 4101 [with the Secretary of the Treasury as a fuel taxpayer under I.R.C. §§ 4041, 4081 or 4091] unless there was a prior taxable removal or entry of such fuel under clause (i), (ii), or (iii).

(B) Exemption for bulk transfers to registered terminals or refineries

The tax imposed by this paragraph shall not apply to any removal or entry of a taxable fuel transferred in bulk to a terminal or refinery if the person removing or entering the taxable fuel and the operator of such terminal or refinery are registered under [I.R.C.] section 4101.

(Bracketed material added by the Department.)

Shortly after the 1990 revision of I.R.C. § 4081(a)(1) took effect, the IRS promulgated certain commentary and regulations interpreting that statute, cited below. The contemporaneous construction of a federal act by those charged with setting its machinery in motion is presumptively correct. *In re Trans Alaska Pipeline Rate Cases*, 98 S.Ct. 2053, 2063 n.26 (1978), and cases there cited. In addition, as previously noted,

Congress in 1993 not only extended the tax to diesel fuel, but also left the taxable events listed in I.R.C. § 4081(a)(1)(A) unchanged in the 1993 amendments. *See* Revenue Reconciliation Act of 1993, § 13242(a), 107 Stat. at 514. By failing to change those taxable events, Congress approved both the IRS' interpretation of I.R.C. § 4081(a)(1) in that commentary and those regulations and (by implication) extending that interpretation to diesel fuel taxation. "The administrative construction [of a tax statute] must be deemed to have received legislative approval by the re-enactment of the statutory provision, without material change." *United States v. Dakota-Montana Oil Co.*, 53 S.Ct. 435, 438 (U.S. 1933). Those administrative materials, and consistent commentary and regulations promulgated to implement the diesel fuel tax, therefore provide background information useful to learning how I.R.C. § 4081(a)(1) applies in practice. Moreover, by logical extension, comparing these federal materials to the Special Fuel Tax Law reveals how the latter statute in general, and IC § 6-6-2.5-20 in particular, work.

On August 27, 1991 the IRS, acting under I.R.C. § 4081, published Notice of Proposed Rulemaking PS—120—90, Gasoline Excise Tax, 1991-2 C.B. 1105, 56 Fed. Reg. 42,287, which contained proposed regulations to implement that tax. The IRS, after it had received public comments on the proposed regulations and made certain changes not relevant here, announced the final version of the gasoline regulations on July 22, 1992, effective January 1, 1993. Gasoline Tax: Removal or Sale of Gasoline, T.D. 8421, 1992-2 C.B. 260, 57 Fed. Reg. 32,424 (codified as Treas. Regs. §§ 48.4081-1 to -8 (1993)). Of those regulations that are relevant for present purposes, Treas. Reg. § 48.4081-1 is the definitional section. Treas. Reg. § 48.4081-2 imposed the excise tax upon removal of gasoline from a terminal, while Treas. Reg. § 48.4081-3 specified events other than removal from a terminal upon the occurrence of which the tax was to be imposed. Of the events listed in the latter regulation, those most relevant for purposes of interpreting the definition of "received" in IC § 6-6-2.5-20 and resolving this protest are removal from a refinery and entry into the United States. Treas. Reg. § 48.4081-3(b) and (c) (1993), respectively.

As previously mentioned above, during 1993 Congress expanded the federal tax to include diesel fuel. To implement this intervening statutory development, the IRS published additional, temporary regulations on November 30, 1993, effective January 1, 1994, and simultaneously published Notice of Proposed Rulemaking PS—52—93, which adopted the temporary regulations as proposed permanent regulations. Diesel Fuel Excise Tax: Registration Requirements Relating to Gasoline and Diesel Fuel Excise Tax, T.D. 8496, 1993-2 C.B. 281, 58 Fed. Reg. 63,069 and 1993-2 C.B. 639 at 639 and 640, 58 Fed. Reg. 63,131 at 63,131 and 63,132, respectively. The IRS promulgated and proposed these regulations under I.R.C. §§ 4081—83, among other Code provisions. The temporary regulations relied on the definitions set out in Treas. Reg. § 48.4081-1, but supplemented them with additional ones in Temp. Treas. Reg. § 48.4081-10T that were specific to diesel fuel and kerosene. Temp. Treas. Regs. §§ 48.4081-11T and -12T imposed the manufacturers' excise tax on diesel fuel upon the occurrence of the same events as those set out for gasoline in Treas. Regs. §§ 48.4081-2 and -3, respectively.

On October 19, 1994, after the IRS amended parts of the temporary regulations not applicable here, it “proposed regulations generally consolidat[ing] the rules relating to gasoline and diesel fuel into a single set of rules applicable to all taxable fuel.” Notice of Proposed Rulemaking PS—66—93, Excise Taxes: Special Fuels: Gasoline and Diesel Fuel: Gasohol: Compressed Natural Gas, 1994-2 C.B. 907, 908, 59 Fed. Reg. 52,735 at 52,736. The IRS published the final version of the consolidated regulations on March 14, 1996. Gasoline and Diesel Fuel Tax: Registration Requirements, T.D. 8659, 1996-1 C.B. 264, 61 Fed. Reg. 10,450. However, consolidated Treas. Regs. §§ 48.4081-1(d), -2(e) and -3(i) all stated that those regulations were to take effect January 1, 1994 (by implication, retroactively). 1996-1 C.B. at 269-71 *passim*, 61 Fed. Reg. at 10,455-57 *passim*. Thus, either the temporary diesel fuel tax regulations or the consolidated taxable fuel regulations were in effect for the majority of the taxpayer’s audit period. The IRS recodified the definitions consolidated from former Treas. Reg. § 48.4081-1 and Temp. Treas. Reg. § 48.4081-10T into current Treas. Reg. § 48.4081-1(b) (1998). 1996-1 C.B. at 268-69, 61 Fed. Reg. at 10,453-54. As previously noted, the taxpayer has cited the definition of the term “entry into the United States” in this subsection as analogous authority supporting its argument. The IRS made no substantive changes in the consolidated regulations to that definition or to any of the other definitions and regulations that had appeared in the gasoline and temporary diesel fuel tax regulations. For these reasons, and to provide future guidance to other special fuel taxpayers, the Department will cite to the consolidated regulations below unless otherwise noted.

(iv) IRS Commentary and Regulations Concerning the Bulk Transfer/Terminal System

When the IRS first promulgated the gasoline excise tax regulations, it noted that substantial amounts of tax evasion may have occurred under pre-1990 versions of I.R.C. § 4081. Notice of Proposed Rulemaking PS—120—90, Gasoline Excise Tax, 1991-2 C.B. at 1105 and 1106, 56 Fed. Reg. at 42,288 and 42,289. The IRS then stated that

Congress sought to resolve these problems in amendments made to the Code by section 11212 of the Revenue Reconciliation Act of 1990, Public Law 101-239 (the “1990 Act”) [quoted above, as amended].

Effective July 1, 1991, the 1990 Act amends section 4081 of the [Internal Revenue] Code to provide that tax is imposed on (1) The removal of gasoline from any refinery, (2) the removal of gasoline from any terminal, (3) the entry of gasoline into the United States for consumption, use, or warehousing, and (4) the sale of gasoline to an unregistered person unless there was a prior taxable removal, entry or sale of such gasoline. *However, the tax does not apply to any entry or removal of gasoline transferred in bulk to a terminal if the persons involved (including the terminal operator) are registered [under I.R.C. § 4101].*

Id. at 1106, 56 Fed. Reg. at 42,289 (emphases added). The parts of the IRS’ introductory comments to the temporary diesel fuel tax and consolidated regulations that discuss the

purpose of the 1993 federal act and the taxable events under I.R.C. § 4081 (as amended by that act) are substantially identical to the above quotation. Diesel Fuel Excise Tax: Registration Requirements Relating to Gasoline and Diesel Fuel Excise Tax, T.D. 8496, 1993-2 C.B. 281, 282, 58 Fed. Reg. 63,069 at 63,069-70; Notice of Proposed Rulemaking PS—66—93, Excise Taxes: Special Fuels: Gasoline and Diesel Fuel: Gasohol: Compressed Natural Gas, 1994-2 C.B. at 908, 59 Fed. Reg. at 52,735-36. Both of the latter commentaries explicitly state that “the 1993 Act amends section 4081 to impose the diesel fuel tax in the same manner as the gasoline tax.” *Id.*, 58 Fed. Reg. at 63,069 and 59 Fed. Reg. at 52,735, respectively. Immediately after these sentences the IRS then itemizes exactly the same taxable events as those listed in the above-quoted commentary (and, by extension, in I.R.C. § 4081(a)(1)(A)) and repeats the above-emphasized qualification that bulk transfers between persons registered under I.R.C. § 4101 are not subject to tax. *Id.* The only difference between the above-emphasized qualifying statement in the gasoline and those in the later regulation commentaries is that, unlike the earlier one, the latter two add references to bulk transfers to refineries. *Id.*, 58 Fed. Reg. at 63,069-70 and 59 Fed. Reg. at 52, 735-36, respectively. The Department presumes that the IRS made these latter additions to reflect the amendment of I.R.C. § 4081(a)(1)(B) by the Revenue Reconciliation Act of 1993, § 13242(a), 107 Stat. at 514, to include refineries.

It is readily inferable from the above commentaries that the IRS interpreted I.R.C. § 4081(a)(1)(B) as excluding from tax transfers into or within the taxable fuel distribution system if the parties to the transaction are registered under I.R.C. § 4101 and one of them is also the terminal operator. Such transfers are not subject to the federal fuel manufacturers’ excise tax. The IRS’ taking the trouble to define what it calls the “bulk transfer/terminal system,” and certain related words and terms, in Treas. Reg. § 48.4081-1(b) supports these inferences. Those definitions, which help to interpret IC § 6-6-2.5-20 and apply it to the present protest, read as follows:

Bulk transfer means any transfer of taxable fuel by pipeline or vessel.

Bulk transfer/terminal system means the taxable fuel distribution system consisting of refineries, pipelines, vessels, and terminals. *Thus, taxable fuel in a refinery, pipeline, vessel or terminal is in the bulk transfer/terminal system. Taxable fuel ... in any ... trailer, truck, or other equipment suitable for ground transportation is not in the bulk transfer/terminal system.*

...

Refinery means a facility used to produce taxable fuel from crude oil, unfinished oils, natural gas liquids, or other hydrocarbons and from which taxable fuel may be removed by pipeline, by vessel, or at a rack.

....

Terminal means a taxable fuel storage and distribution facility that is supplied by pipeline or vessel and from which taxable fuel may be removed at a rack.

...

Vessel means a waterborne taxable fuel transporting vessel.

Id (emphases of terms in original; second emphasis added; originally promulgated as Treas. Reg. § 48.4081-1(e), (f), (p), (s) and (v) (1993), respectively). It is clear from the emphasis in the above definition of “bulk transfer/terminal system” on whether fuel is or is not in that system that the IRS views it as being analogous to a bank or other depository. If fuel is deposited and remains on deposit in that system, *i.e.* in a refinery, pipeline, vessel or terminal, then (with some exceptions) it is not subject to the federal fuel manufacturers’ excise tax. Those exceptions ordinarily arise, and tax is imposed on fuel still within the system, where one party to an intra-system fuel transaction is not registered under I.R.C. § 4101.

(v) The Special Fuel Tax Law’s Treatment of the Bulk Transfer/Terminal System

Like I.R.C. § 4081(a)(1)(B), the Special Fuel Tax Law also treats fuel entered into or transferred within the bulk transfer/terminal system as being ordinarily not subject to tax. For example, current IC § 6-6-2.5-28(e) (formerly IC § 6-6-2.5-28(d) (1993), 1993 Ind. Acts 4738-39) excludes from tax special fuel from tank steamers and pipelines held in storage pending wholesale bulk distribution or reshipment. Similarly, IC § 6-6-2.5-62(a) permits undyed special fuel suppliers to manufacture such fuel in Indiana, or to import it by pipeline or waterborne barge and store it within an Indiana terminal, without collecting or accruing Indiana special fuel tax.

Most importantly for present purposes (specifically for purposes of Issue III), the definition of “received” in IC § 6-6-2.5-20 contains an “except[ion] for transfers in bulk into or within a terminal in Indiana between registered suppliers.” *Id.* “The definition[] of the term[] ... ‘transfers in bulk’ shall have the same meaning[] described in the Internal Revenue Code or Code of Federal Regulations.” *Id.* The federal regulatory definition of “bulk transfer” was previously quoted above and will be important in deciding Issue III below. (“Transfer in bulk into or within a terminal” is now defined by IC § 6-6-2.5-25.1, which was added by section 21 of the 1994 amendments, 1994 Ind. Acts at 436-37, but this definition was not in effect when the transactions forming the subject of Issue III occurred.) The original definition of “terminal” in IC § 6-6-2.5-24 tracked the first sentence of the federal regulatory definition of that word almost verbatim. 1993 Ind. Acts at 4738. However, section 20 of the 1994 amendments added to this definition the requirement that the facility in question also be registered with the IRS “for receipt of taxable motor fuels *free of federal motor fuel taxes.*” 1994 Ind. Acts at 436 (emphasis added).

Under I.R.C. § 4081(a)(1)(B) a transfer of taxable fuel to a terminal must be between or among registered persons, one of which must be a refinery or terminal operator, to be excluded from the federal tax. Similarly, but not identically, a transfer in bulk into or within a terminal in Indiana must be between registered suppliers to fall within the exception to the definition of “received” in IC § 6-6-2.5-20. The Special Fuel Tax Law does not explicitly define the term “registered supplier”; however, the meaning of that term becomes clear by referring to the definitions of “permissive supplier” and “supplier” in IC §§ 6-6-2.5-16.1 and -23. As will be shown below, both definitions require that the person in question be registered under I.R.C. § 4101.

As originally enacted, IC § 6-6-2.5-23 further defined “supplier” in relevant part as “a person ... [so] registered ... for *tax free* transactions in gasoline.” 1993 Ind. Acts 4737-38 (emphasis added). Section 19 of the 1994 amendments, 1994 Ind. Acts at 436, updated this part of IC § 6-6-2.5-23. As so refined, the definition of supplier now includes “a person ... that owns special fuel in the pipeline and terminal distribution system in Indiana, and ... is also registered under Section 4101 of the Internal Revenue Code for transactions in *taxable motor fuels in the bulk distribution system*.” *Id* (emphasis added). The emphasized language uses terms employed in the expansion of the federal tax to include diesel fuel and in the IRS regulations, which as previously mentioned had respectively occurred and taken effect in 1993 or at the beginning of 1994. It is thus clear that, with one exception, the 1994 amendment to IC § 6-6-2.5-23 simply conformed the definition of “supplier” to those federal developments. The amendment did add language referring to “own[ership of] special fuel in the pipeline and terminal distribution system in Indiana,” *id.*, but did not otherwise materially change that definition. In particular, the requirement that a person be registered under I.R.C. § 4101 to qualify as a supplier remained constant.

As originally enacted IC § 6-6-2.5-41(b), which requires permissive suppliers to obtain licenses from the Department, tacitly defined “permissive supplier” as a “supplier that does not engage in business in Indiana but desires to collect the tax imposed by this chapter[.]” 1993 Ind. Acts at 4747. The Department administratively construes the use of the word “supplier” in this language as having required, while it was in effect, that a permissive supplier be registered under I.R.C. § 4101 as required by IC § 6-6-2.5-23. This interpretation is consistent with the current definition of “permissive supplier” in IC § 6-6-2.5-16.1, which was added by section 15 of the 1994 amendments, 1994 Ind. Acts at 435, and which explicitly requires that a permissive supplier be “*registered under Section 4101 of the Internal Revenue Code*.” *Id* (emphasis added).

Thus, as under I.R.C. § 4081(a)(1)(B), all parties to a transfer of special fuel in bulk into or within a terminal in Indiana must be registered under I.R.C. § 4101 for that transfer to fall within the exception to the definition of “received” in IC § 6-6-2.5-20. All of the parties to the transfer also must fit the definition of permissive supplier or supplier if the transfer is *into* an Indiana terminal. Such a bulk transfer may be from a permissive supplier as transferor to one or more suppliers as transferees, or may be between or among persons who all fit the definition of supplier.

If the bulk transfer is *within* an Indiana terminal, however, then no party to the transfer can be a permissive supplier. Depending on the date of the transfer and the definition of “permissive supplier” that applies, a permissive supplier either “does not engage in business in Indiana” or “does not meet the geographic jurisdictional connections to Indiana required of a supplier (as defined in section 23 of this chapter)[.]” Former IC § 6-6-2.5-41(b) (1993) and current IC § 6-6-2.5-16.1 (Supp. 1997), respectively. A permissive supplier is not a “supplier” as IC § 6-6-2.5-23 defines the latter word. Specifically, a permissive supplier does not engage in Indiana in any of the activities of a supplier involving special fuel described in IC § 6-6-2.5-23, and therefore has no special fuel within a terminal in Indiana to transfer in bulk to a registered supplier. (Customer A’s status as a permissive supplier also will be important in deciding Issue III below.)

All parties to a bulk transfer of special fuel within an Indiana terminal must be suppliers. Unlike I.R.C. § 4081(a)(1)(B), the fact that a party to such a bulk transfer is a terminal operator will not, without more, make the exception to being “received” apply. To make that exception applicable, the bulk transfer must be “*between registered suppliers.*” *Id* (emphasis added). The last sentence of the definition of “supplier” in IC § 6-6-2.5-23 specifically states that “[a] terminal operator shall not be considered a supplier merely because the terminal operator handles special fuel consigned to it within a terminal.” Thus, if a party to a bulk transfer into or within an Indiana terminal is also the terminal operator (as defined by IC § 6-6-2.5-25), that party must in addition be engaged in one or more of the activities that IC § 6-6-2.5-23 describes for the exception to receipt to apply.

If any party to a bulk transfer of special fuel into or within an Indiana terminal fails to meet any criteria necessary to qualify as a registered supplier, then the exception to receipt in IC § 6-6-2.5-20 does not apply to that transfer or to any of those parties. The transferred special fuel is “received” as IC § 6-6-2.5-20 defines that word and is presumptively subject to Indiana special fuel tax.

(vi) IRS Treatment of Withdrawal at the Rack or Other Use Outside the Bulk Transfer/Terminal System as the Federal Taxable Events

It is also inferable from the above-referenced IRS commentaries that it interpreted I.R.C. § 4081(a)(1)(A) as imposing tax on imported fuel not transferred into, on fuel sold to an unregistered person while within, or most frequently on fuel withdrawn from, the bulk transfer/terminal system. According to the IRS’ commentaries, such withdrawals ordinarily occur at a rack, usually a terminal rack. When it promulgated the temporary diesel fuel tax regulations, the IRS stated that “[a]s under the gasoline tax regulations, these temporary regulations provide that tax is imposed on diesel fuel removed from the terminal at the rack.” Diesel Fuel Excise Tax: Registration Requirements Relating to Gasoline and Diesel Fuel Excise Tax, T.D. 8496, 1993-2 C.B. at 282, 58 Fed. Reg. 63,069 at 63,070. When it first proposed the gasoline tax regulations, the IRS had noted that “[g]asoline leaves the bulk transfer/terminal system at the terminal ‘rack.’ At the rack, gasoline is usually loaded into tank trailers that are operated by, or on behalf of, wholesale distributors.” Notice of Proposed Rulemaking PS—120—90, Gasoline Excise

Tax, 1991-2 C.B. at 1105, 56 Fed. Reg. at 42,287. It then went on to state that “[u]nder the 1990 Act, tax is imposed on any removal of gasoline at the terminal rack[.]” *Id.* at 1106, 56 Fed. Reg. at 42,289 (emphasis added).

Consistent with the above commentaries, final Treas. Reg. §§ 48.4081-2 and -3(b)(1)(ii) respectively impose the federal tax on taxable fuel removed from rack of a terminal or a refinery (*i.e.*, from the bulk transfer/terminal system as defined above). Treas. Reg. § 48.4081-1(b) defines a “rack” as “a mechanism for delivering taxable fuel from a refinery or terminal into a *truck, trailer, railroad car, or other means of nonbulk transfer.*” *Id.* (emphases added; originally promulgated as former Treas. Reg. § 48.4081-1(n) (1993)).

In addition, as the Department will discuss below, Treas. Reg. § 48.4081-3(c) levies the tax upon taxable fuel entered into the United States by bulk transfer of an unregistered entrant, or by other than bulk transfer. The Department will also explain in that discussion the definitions of “entry” and “entry into the United States” in Treas. Reg. § 48.4081-1(b).

3. Acts Constituting Receipt of Special Fuel

In view of the foregoing federal administrative history, it is also clear from the analysis of IC § 6-6-2.5-20 set out below that an act of receipt of special fuel, as IC § 6-6-2.5-20 defines “received,” is the primary taxable event under the Special Fuel Tax Law. Like the acts described in I.R.C. § 4081(a)(1)(A), all of the acts described in IC § 6-6-2.5-20 occur outside the bulk transfer/terminal system. Moreover, a comparison of IC § 6-6-2.5-20 with I.R.C. § 4081(a)(1) clause-by-clause reveals that the former statute tracks the latter, almost verbatim in some respects. The Department therefore construes IC § 6-6-2.5-20 as being substantially modeled on, and except for any express differences will construe it consistent with, the subdivisions of I.R.C. § 4081(a)(1).

IC § 6-6-2.5-20 specifies the following ways applicable to this protest in which special fuel can be “received” and, for the reasons discussed above under “Scope of the Special Fuel Tax,” are presumptively subject to that tax if they occur:

1. “[T]he removal from any refinery or terminal in Indiana ... of any special fuel for consumption, use, sale, or warehousing” and “special fuel which is the subject of a tax precollection agreement pursuant to section 35(j) of this chapter[.]” *id.* (hereafter collectively “Type 1 receipt”). This language embodies what has become known popularly as the “upstream” collection provision of the Special Fuel Tax Law. As the preceding quotations imply, Type 1 receipt can be one of two subtypes:

a. “[T]he removal from any refinery or terminal in Indiana ... of any special fuel for consumption, use, sale, or warehousing ... except for transfers in bulk into or within a

terminal in Indiana between registered suppliers[.]” *id* (hereafter “Type 1A receipt”). This phrase combines the taxable events found in I.R.C. § 4081(a)(1)(A)(i) and (ii), as limited by I.R.C. § 4081(a)(1)(B) and the Department’s above discussion of the “registered supplier” requirement. I.R.C. § 4081(a)(1)(A)(i) and (ii) respectively tax removals from “any refinery” or “any terminal” within the United States. *Cf. also* IC § 6-6-1.1-202(a) (deeming gasoline received when withdrawn from an in-state refinery or terminal for in-state sale, use or transfer, except to another in-state refinery or terminal). I.R.C. § 4083(b) defines “removal” as use of taxable fuel other than in the production of gasoline, diesel fuel, or “special motor fuels” as I.R.C. § 4041(a)(2)(A) describes the latter term (which includes the substances defined as being “alternative fuel” as defined in IC § 6-6-2.5-1). Treas. Reg. § 48.4081-1(b) further defines “removal” as any physical transfer of taxable fuel, and any use of such fuel other than as a material in the production of gasoline or special motor fuels (as defined in Treas. Reg. § 48.4041-8(f)), other than by evaporation, loss or destruction. *Id* (originally promulgated in former Treas. Reg. § 48.4081-1(q) (1993)).

b. “[S]pecial fuel which is the subject of a tax precollection agreement pursuant to section 35(j) of this chapter[.]” IC § 6-6-2.5-20 (hereafter “Type 1B receipt”). As will be discussed below, the Department construes this phrase as including special fuel subject to a licensed supplier’s election under IC § 6-6-2.5-35(j), and also construes a Type 1B receipt as equivalent to a Type 1A receipt.

2. “[T]he entry into Indiana of any special fuel for consumption, use, sale, or warehousing, except for transfers in bulk into or within a terminal in Indiana between registered suppliers[.]” IC § 6-6-2.5-20 (hereafter “Type 2 receipt”). As will also be discussed below, the description of Type 2 receipt to some extent parallels “entry into the United States” under I.R.C. § 4081(a)(1)(A)(iii), again as limited by I.R.C. § 4081(a)(1)(B). *Cf. also* IC §§ 6-6-1.1-203 and -205 (respectively deeming the owner of imported gasoline unloaded at other than a refinery or terminal, and any licensed distributor who delivers imported gasoline to someone other than another licensed distributor, the recipient of the gasoline for fuel tax purposes).

4. Even If Special Fuel Is Not Received, It Is Still Subject to Tax If
It Is Used or Sold for Use in Motor Vehicles.

However, as previously noted, IC § 6-6-2.5-20 describes the *primary* taxable events under the Special Fuel Tax Law. It does not describe the *only* taxable events; the list of such events in IC § 6-6-2.5-20 is not exclusive. The *ultimate* taxable events occur when special fuel is “sold or used in producing or generating power for propelling motor vehicles[.]” IC § 6-6-2.5-28(a). Thus, special fuel that is so sold or used is still subject to tax by virtue of IC § 6-6-2.5-28(a) if for any reason tax was not paid when that fuel was “received” as described by IC § 6-6-2.5-20.

5. Overview of the Application of the Types of Receipt to This Protest

To simplify deciding the present protest, the Department has divided the various transactions involved into broad groups based on the date on and the terminal from which the purchase of fuel occurred, and has assigned one of the above types of receipt to each such category. As regards the present issue in particular, for reasons to be set out below, the Department has made September 22, 1994, the date that the Department received the taxpayer’s Form SF-10A (hereafter “the election date”), the date which divides the audit period into two time frames. The Department will hereafter refer to the period falling on or after the election date as “the post-election period.” Purchases from Terminals 2, 3 and 4 made during that time frame will be called “post-election removals.” Conversely, the Department will refer to the period before, and purchases from those terminals occurring prior to the election date, as being “the pre-election period” and “pre-election removals,” respectively. For reasons also to be set out below, the Department will treat pre-election removals from Terminals 2, 3 and 4 as being Type 2 receipts and post-election removals from those terminals as being Type 1B receipts. However, the Department will treat purchases from Terminal 1 that in fact remained in Indiana, regardless of when the purchase occurred during the audit period, as being Type 1A receipts, as it will discuss in detail under Issue II below.

F. IC § 6-6-2.5-35(j) WAS NOT RETROACTIVE.

Both the field auditor and the Audit Division Protest Review Board cited IC § 6-6-2.5-35(j) as authority supporting assessments against the taxpayer on the unreported imports by customers. As it read during the last two quarters of the taxpayer’s audit period, that statute stated in relevant part that

any licensed supplier or permissive supplier may make an election with the department to treat all out-of-state terminal removals with an Indiana destination as shown on the terminal-issued shipping paper as if the removals were received by the supplier in Indiana pursuant to sections 28 and 35(a) of this chapter, for all purposes.

The Department notes at the threshold that the field auditor's and the Board's decisions, and the taxpayer's rehearing argument in response to them, all assume that IC § 6-6-2.5-35(j) was in effect throughout the taxpayer's protest period. That was not the case. The General Assembly added IC § 6-6-2.5-35(j) to the Special Fuel Tax Law in section 27 of the 1994 amendments, 1994 Ind. Acts at 443. As previously noted, the amendments, including IC § 6-6-2.5-35(j), did not take effect until July 1, 1994. There is no language in the 1994 amendments indicating that the legislature intended them to be retroactive.

In *Gosnell v. Indiana Soft Water Service, Inc.*, 503 N.E.2d 879 (Ind. 1987), the Indiana Supreme Court said that “[u]nless there are strong and compelling reasons, statutes will normally be given prospective application.” *Id.* at 880. *Cummins v. Pence*, 91 N.E. 529 (Ind. 1910), an opinion involving a taxpayer's challenge to construction of a public highway, had previously held the rule of prospective application to apply to amendments in particular. *Id.* at 532. And most importantly for purposes of resolving the present issue, in *Stewart v. Marson Construction Corp.*, 191 N.E.2d 320 (Ind. 1963), the Indiana Supreme Court said that:

The general rule ... is ... [that] *a statute will not ordinarily be given a retroactive construction by which it will impose liabilities not existing at the time of its passage or which will affect an existing liability to the detriment of a defendant [or in this case a taxpayer].*

Id. at 321 (emphasis added).

The original Special Fuel Tax Law of 1993 did not contain any provision requiring suppliers to precollect and remit tax on fuel removed from out-of-state terminals and destined for Indiana. It was the 1994 amendments that first created that liability by adding new IC § 6-6-2.5-35(j). *Gosnell*, *Cummins* and *Marson Construction*, *supra* therefore require that the Department apply IC § 6-6-2.5-35(j) prospectively only instead.

However, the period of prospective application of this subsection of the statute as to this taxpayer was within the taxpayer's control. As quoted above, IC § 6-6-2.5-35(j) clearly states in relevant part that “any licensed supplier or permissive supplier *may* make an *election*[.]” *id* (emphases added), to precollect and remit tax on all removals of special fuel destined for Indiana from out-of-state terminals. Under the rules of statutory interpretation, “may” is normally construed in its plain and ordinary sense of conferring discretion, or being discretionary rather than mandatory. *State ex rel. Smitherman v. Davis*, 151 N.E.2d 495, 497 n.2 (Ind. 1958). Similarly, the word “election” implies that the person having the right to elect is making a conscious choice over a matter or subject within that person's control. *Standard Oil Co. v. Hawkins*, 74 F. 395 (7th Cir. 1896) describes an “[e]lection, ... [as being] the internal, free, and spontaneous separation of one thing from another, existing in the mind and will.” *Id.* at 398 (internal quotation marks omitted). *Dick v. Glenn*, 31 N.E.2d 1009, 1013 (Ind. 1941), states that an election

must be made with knowledge of the party's rights and with the intention of making an election.

It follows that the across-the-board precollection language of IC § 6-6-2.5-35(j) did not and could not apply to the present licensed supplier until September 22, 1994, when its Form SF-10A electing this option was received by the Department and took effect. Thus, the supplier had a legal duty to precollect tax under IC § 6-6-2.5-35(j) only on removals of special fuel from Terminals 2, 3 and 4 that occurred during the post-election period and that the respective shipping papers for which showed were destined for Indiana. Put another way, only post-election removals were, and pre-election removals were not, Type 1B receipts. By process of elimination, pre-election removals were instead Type 2 receipts, *i.e.* "entr[ies] into Indiana of ... special fuel for consumption, use, sale, or warehousing[.]" IC § 6-6-2.5-20. The Department will therefore determine below the question of the taxpayer's liability for special fuel tax on the pre-election removals based on that premise.

G. THE TAXPAYER WAS NOT THE IMPORTER OF,
AND NOT LIABLE FOR SPECIAL FUEL TAX ON,
THE PRE-ELECTION REMOVALS.

1. The Importer Is Solely Liable for the Tax on Special Fuel
Entered Into Indiana if the Supplier Has Not Agreed to
Precollect Tax on Fuel Removed From Its Out-of-State Terminals.

*a. Introduction—Authority Cited During the Audits in
Support of Assessing the Unreported Imports*

The field auditor assessed tax on any removals from Terminals 2, 3 and 4 for which the taxpayer's books showed an Indiana Wholesale Identification Code ("WIC") for the customer. The field auditor also assessed tax on each removal of special fuel from Terminals 2, 3 and 4 for which the shipping paper showed that the transaction was "F.O.B. [Terminal 1]" (sic) or for "[Terminal 1] pick up" (sic). The part of the Audit Summary discussing this adjustment paraphrases IC §§ 6-6-2.5-20 and -35(j), indicating that the field auditor relied on both statutes as authority in support of the part of the assessment resulting from that adjustment. The field auditor's reliance on IC § 6-6-2.5-35(j) was misplaced as to the pre-election removals for the reasons previously discussed above. The taxpayer was under no duty to precollect and remit special fuel tax on the unreported imports until after that statute took effect and the taxpayer elected to do so.

b. Summary of Importer Liability Holdings

As will be explained below, the Department construes the Type 2-receipt clause of IC § 6-6-2.5-20 and the provisions of the Special Fuel Tax Law applicable to imported special fuel as imposing the tax solely on the importer of fuel removed from an out-of-state terminal of a non-electing supplier. That importer usually will be the person identified as such on the shipping paper (hereafter "the importer of record"), but in certain situations

specified below may be another person (hereafter “the importer in fact”). The Department has also developed criteria, to be set out below, from which the importer in fact can be identified in situations where the shipping paper does not explicitly identify the importer or for whatever reason does not reflect the true importer’s identity.

2. Importation of Special Fuel Occurs Upon Its “Entry Into Indiana.”

a. The Meaning of “Entry” Under the Federal Fuel Manufacturer’s Excise Tax

Under IC § 6-6-2.5-20, “entry” is to have the same meaning as it does under the Internal Revenue Code and Code of Federal Regulations. Type 2 receipt occurs under IC § 6-6-2.5-20 upon the “*entry into Indiana* of any special fuel ... [.]” while IC § 6-6-2.5-28(d) now explicitly imposes tax on special fuel imported into Indiana, other than into a terminal, at the time that the fuel is “*entered into Indiana*” (emphases added). As will be shown below, the status of Customer E’s unreported imports will hinge in part on the applicability of these phrases. They appear to be adaptations of the phrase “entered into the United States” under applicable customs law, as used in the definition of “entry into the United States” in Treas. Reg. § 48.4081-1(b). The taxpayer gave an abbreviated quotation of this definition as stating that “ ‘[e]ntry of taxable fuel into the United States occurs *when the taxable fuel is brought into the United States.*’ ” *Id* (emphasis and punctuation the taxpayer’s). The relevant portion of the definition reads in full as follows:

Entry of taxable fuel into the United States occurs when—

(1) The taxable fuel is brought into the United States and applicable customs law requires that the taxable fuel be entered into the United States for consumption, use or warehousing[.]

Id (emphasis added by the Department; originally promulgated as former Treas. Reg. § 48.4081-1(h) (1993)). The phrase “entered into the United States” appears to refer to the filing of the documentation, or the providing of the information, set out in 19 U.S.C. § 1484(a) that is necessary to effect an “entry of merchandise” under the customs laws. (The Customs Service uses the documentation or information to properly assess import duties, among other purposes. *Id.*)

b. “Entry Into Indiana” of Special Fuel Is a Delivery of the Fuel to an Indiana Destination Other Than A Terminal, Plus the Transporter’s Tender of the Shipping Paper to Any Bulk Plant Operator or Retail Operator to Which the Fuel Is Delivered.

An previously noted, the phrases “entry into Indiana” and “entered into Indiana” appear to be adaptations of the phrase “entry into the United States.” An entry of special fuel into Indiana is therefore analogous to an entry of federally taxable fuel into the United

States as defined by Treas. Reg. § 48.4081-1(b). However, the analogy requires more than that special fuel is merely transported over the state line into Indiana, as the taxpayer argues. That fuel must also be actually delivered to, *i.e.* unloaded at, a destination in the state other than a terminal. IC § 6-6-2.5-13 defines “import,” with respect to both sellers and purchasers, as “when special fuel is *delivered* into Indiana from out-of-state” (emphasis added). In addition, there must be a tender of documentation containing information recording that delivery, analogously to the documentation or information used to effect an “entry of merchandise” under 19 U.S.C. § 1484(a). IC §§ 6-6-2.5-40(c) and (d) respectively require vehicular special fuel transporters to give operators of Indiana retail outlets or bulk plants where “*delivery*” is made originals or copies of, and require operators to which special fuel is “*delivered*” to keep, the accompanying terminal issued document (emphases added). As with “entry into the United States,” “entry into Indiana” also implies that the documentation will contain information from which any tax due can be determined. IC § 6-6-2.5-62(e) in fact requires the terminal-issued shipping paper to include a notation whether the load of fuel, or any part of it, is tax exempt, has tax due or (by virtue of section 33 of the 1994 amendments, 1994 Ind. Acts at 452) is pretaxed.

3. The Importer of Special Fuel Into Indiana Is Its “Enterer,” Which Is Liable for the Tax.

a. Authorities Defining “Enterer” and “Importer” or Imposing Special Fuel Tax on the Importer

An “entry of merchandise” necessarily implies an “enterer” of that merchandise who will supply the needed documentation or information. The Department similarly construes the phrases “entry into Indiana” in the Type 2-receipt clause of IC § 6-6-2.5-20 and “entered into Indiana” in current IC § 6-6-2.5-28(d) as implying the existence of an “enterer,” which is defined in Treas. Reg. § 48.4081-1(b) as follows:

Enterer generally means *the importer of record* (under customs law) with respect to the taxable fuel. However, if the importer of record is acting as an agent ... , the person for whom the agent is acting is the enterer. If there is no importer of record for taxable fuel entered into the United States, the owner of the taxable fuel at the time it is brought into the United States is the enterer.

Id (emphases added by the Department; originally promulgated as former Treas. Reg. § 48.4081-1(g) (1993)). In addition to the previously cited federal authorities, the Department bases this interpretation of the Type 2-receipt clause in IC § 6-6-2.5-20, and current IC § 6-6-2.5-28(d) on four other provisions in the Special Fuel Tax Law. The first, which applied throughout the taxpayer’s audit period, is IC § 6-6-2.5-28(b), previously quoted above. As interpreted earlier in this letter, IC § 6-6-2.5-28(b) makes it a rebuttable presumption that all special fuel received in Indiana (which necessarily

includes all Type 2 receipts) is subject to the tax. Since, as was also previously discussed, receipt is the main taxable event under the Special Fuel Tax Law, it is logical to infer that the tax on a Type 2 receipt is imposed on the recipient, *i.e.* the enterer or importer. In addition, unlike IC §§ 6-6-2.5-28(c) or -35(a), neither IC §§ 6-6-2.5-28(b) nor (d) refer to receipt of special fuel by a supplier or to being licensed. Thus, an importing recipient of special fuel does not escape liability for the tax by not having been a supplier or not holding the appropriate license. (Neither supplier nor licensee status are relevant evidence of whether or not a particular transaction is an import or whether the person causing the fuel to be delivered in Indiana is the importer liable for the tax. The evidence of the transaction itself will provide the facts from which those questions are to be answered.)

The remaining sections of the Special Fuel Tax Law on which the Department relies are IC §§ 6-6-2.5-35(i), -41(f) and -62(a)(3)(C). These provisions all took effect July 1, 1994 by virtue of sections 27, 30 and 33 of the 1994 amendments, 1994 Ind. Acts at 442-43, 447 and 450, respectively. They must be read together with current IC § 6-6-2.5-28(d), which, as noted above, was also part of the 1994 amendments, and which refers to “[t]he tax imposed by [IC § 6-6-2.5-28](a) on special fuel imported into Indiana[.]” The Department interprets these four provisions as more clearly expressing the original intent of the Type 2-receipt clause of IC § 6-6-2.5-20, and of IC § 6-6-2.5-28(b) as applied to Type 2 receipts. *Economy Oil, supra*, 321 N.E.2d at 219 and opinions there cited.

The first sentence of IC § 6-6-2.5-35(i) explicitly requires that tax to be paid by “the licensed importer who has imported the nonexempt special fuel[.]” *id.*, with one exception not relevant here. IC § 6-6-2.5-41(f) in turn tacitly defines “importer” by mandating an importer’s license for “[e]ach person who wishes *to cause* special fuel to be delivered into Indiana on the person’s *own* behalf, for the person’s *own* account, or for resale to an Indiana purchaser, from another state” *Id* (emphases added).

b. “Importer of Record” Versus “Importer in Fact”

Lastly, IC § 6-6-2.5-62(a)(3)(C) now requires the importer’s name and address to be prominently set out on the terminal-issued shipping paper. This requirement will usually make the entity disclosed on the shipping paper liable for the tax as the importer of record by virtue of IC § 6-6-2.5-35(i). This result is consistent with that reached at the federal level. In addition to being liable for any applicable customs duties, the enterer of taxable fuel into the United States is also liable for the federal fuel manufacturers’ excise tax by virtue of I.R.C. § 4081(a)(1)(A)(iii) as interpreted by Treas. Reg. § 48.4081-3(c)(2). The definition of “enterer” in Treas. Reg. § 48.4081-1(b), quoted above, in turn makes it clear that ordinarily the enterer is the importer of record.

However, that definition also states that if the importer of record is acting as an agent for someone else, then that entity, *i.e.* the importer in fact, is instead the “enterer” and, by extension, the responsible federal fuel excise taxpayer. The definition of “enterer” in Treas. Reg. § 48.4081-1 thus has the effect of making the substance of a fuel transaction control over its form where the two conflict. Similarly, the above quotation from IC § 6-

6-2.5-41(f) indicates that the issue of whether a person is a special fuel importer (and, by extension, a taxpayer) is to be decided based on the realities of the underlying transaction. The language emphasized in that quotation implies that the factors to be considered as establishing importer status include arranging for the delivery (*i.e.*, for the transportation) of the fuel into Indiana and owning or having an ownership interest in the fuel. Thus, if the importer of record is different from the importer in fact, as identified from applying the foregoing criteria, the transaction is to be treated according to its realities and the tax will be imposed on the importer in fact. (However, for the reasons mentioned in discussing IC § 6-6-2.5-28(b) above, the fact that a person holds a license is not relevant evidence that the holder is the importer liable for the tax on a particular shipment of special fuel.)

4. Evidence and Facts Relevant to Identifying the Enterer

a. The Department Will Presume That the Importer of Record is the Enterer Unless There Is Evidence That the Importer of Record Is Not the Importer in Fact.

The Department therefore construes all of the foregoing provisions of the Special Fuel Tax Law as making the importer shown on the shipping paper accompanying imported nonexempt special fuel the enterer of that fuel, who as such is presumptively liable for the tax. However, if there is evidence that this importer of record is not the importer in fact (*e.g.*, in an agency situation), the Department will deem the importer in fact to be the enterer liable for and responsible for remitting the tax on Type 2 receipts. Situations in which the importer of record is not the liable taxpayer will include, but will not be limited to, situations in which the importer of record is acting as an agent for another person. It would be inappropriate to impose tax on the importer of record in such circumstances, both by analogy to the exclusion of agents from the definition of “enterer” in Treas. Reg. § 48.4081-1(b) and because pre-existing Indiana tax law also does not impose tax on agents. *E.g.*, *Department of Treasury v. Ice Service, Inc.*, 41 N.E.2d 201, 204 (Ind. 1942) (affirming the ordering of a refund of gross income tax paid by a person held to have been an agent).

b. A Complete Shipping Paper Is Prima Facie Evidence of a Special Fuel Import, the Importer of Record and the Shipment’s Fuel Tax Status.

Consistent with the above interpretation, the first step in identifying the person liable for the tax on a Type 2 receipt of special fuel is to identify the importer of record. As implied in the previous discussion, the initial (but not the only) document that the Department will use to determine tax liability and taxpayer identity is the shipping paper issued by the operator of the out-of-state terminal or bulk plant from which the imported special fuel was removed. As the Audit Division Protest Review Board noted in the original letter of findings, IC § 6-6-2.5-40(b) requires transporters of special fuel on Indiana public highways to carry a shipping paper prepared by the dispensing terminal or bulk plant operator that sets out the fuel’s state of destination. Current IC § 6-6-2.5-28(d) measures the tax on fuel imported into Indiana, other than into a terminal, “by invoiced gallons received at a terminal or at a bulk plant.” *Id.* IC § 6-6-2.5-62(e) requires the

terminal-issued shipping paper to disclose the tax status of the fuel, which necessarily implies that the paper also disclose the number of gallons received. Lastly, IC § 6-6-2.5-62(a)(3)(C) requires the terminal-issued shipping paper to prominently set out the importer's name and address. The latter addition in particular presumably did no more than mandate what should have already been being done as a matter of good commercial practice.

Thus, the shipping paper should ordinarily include all the information needed to determine, and if it does is prima facie evidence of, whether the fuel it describes was or is being imported into Indiana, who the importer is and whether and how much tax is due. The Type 2-receipt clause of IC § 6-6-2.5-20, and IC § 6-6-2.5-28(b), would then create a rebuttable presumption that the fuel (if undyed) was received in Indiana and that the importer as enterer or Type 2 recipient is subject to tax.

c. Criteria for Identifying Importers in Fact

However, it is nevertheless possible that shipping paper might not always clearly identify the importer of record as such in transactions where two or more parties effected a Type 2 receipt, particularly in transactions that occurred before July 1, 1994, when IC § 6-6-2.5-62(a)(3)(C) took effect. It is also possible that the parties' other records of the transaction, or lack of such other records, may indicate that the importer of record was not the importer in fact. To identify which party is the liable enterer or importer in fact in any such transactions, the Department will use the two criteria referred to in the above quotation from the first sentence of IC § 6-6-2.5-41(f), among other factors. In the specific case of a shipping paper evidencing a Type 2 receipt of special fuel transported by motor vehicle from an out-of-state terminal or bulk plant, the factors that the Department will use to identify the importer in fact will include (in no order of importance):

1. Which party or parties provided, or provided for, each motor vehicle used to transport the fuel from the out-of-state terminal or bulk plant, or from the fuel's last point of transit outside Indiana (if it was transferred from its original transport during transit), to its destination in Indiana;
2. Which party or parties had any ownership interests in or legal title to, and the right to possess, the fuel during transport from the facility, or from the fuel's last point of transit outside Indiana (if any interest in the fuel was transferred during transit), to its Indiana destination; and
3. The place at which the party or parties identified under Factor 2 transferred any ownership interests in or legal title to, and the right to possess, the fuel to the party to whose Indiana destination the fuel was delivered.

*d. Non-Tax Law Used In Developing and Applying the
Ownership Interest/Possession Criteria*

In developing the above criteria the Department has referred to bodies of non-tax law to the extent that they are appropriate and helpful, and will continue to do so in applying these criteria where such authority is not inconsistent with the Special Fuel Tax Law. The primary body of non-tax law to which the Department has referred is commercial law, including the Uniform Commercial Code (hereafter “the U.C.C.” or “the UCC”), which Indiana has enacted at IC art. 26-1 (1993 and 1998). The U.C.C. was also in effect in the adjoining state during the taxpayer’s audit period. However, discussing the adjoining state’s version of the U.C.C. would also disclose the identity of the adjoining state, which would in turn pose some risk that the taxpayer’s identity also might be disclosed. The Department has compared the adjoining state’s and Indiana’s enactments of the sections of the U.C.C. relevant to this protest and has not discovered any differences in the sections applicable to this protest. Therefore, in the interests of preserving the taxpayer’s confidentiality, of simplicity and for the convenience of Indiana-based special fuel taxpayers to whom IC art. 26-1 will clearly apply, the Department will cite to the Indiana version in the following discussion.

IC ch. 26-1-2, which governs the law of sales of goods, has been of particular importance to the Department’s development of the importer-in-fact identification criteria set out above. Indiana appellate court opinions involving other listed taxes have referred repeatedly to the law of sales of goods as a guide in determining tax consequences. The Department will discuss these authorities below, as well as another body of law and legal principles relevant to the development of these criteria, specifically the law of agency. In future the Department where appropriate and helpful will look to other articles of the U.C.C., and to other bodies of non-commercial law and legal principles, to the extent necessary to further develop the above criteria and to supplement the Special Fuel Tax Law and IC art. 26-1. IC § 26-1-1-103 states that such other authorities supplement IC art. 26-1.

As previously noted, to be an “importer” of special fuel as described in IC § 6-6-2.5-41(f), the person must cause fuel to be delivered in Indiana “on the person’s *own* behalf, for the person’s *own* account, or for *resale* to an Indiana purchaser, from another state” *Id* (emphases added). This language is clear evidence that the importer must have an ownership interest sufficient to entitle it to possess and dispose of the fuel by one of the means recognized as a purpose of receipt of special fuel, *i.e.* “for consumption, use, sale or warehousing[.]” IC § 6-6-2.5-20. Unless otherwise agreed IC ch. 26-1-2 guides the resolution of questions of the kind of title or ownership interest in goods that a “purchaser” (defined in IC § 26-1-1-201(33)) acquires as the result of a “purchase” as defined in IC § 26-1-1-201(32). The latter provision defines “purchase” in relevant part as including “taking by sale, ... , negotiation, ... , pledge, ... , gift or any other voluntary transaction creating an interest in property.” *Id*. Unless the importer also owned the land from which, and produced the petroleum from which, the special fuel was refined, the importer acquired its ownership interest in the special fuel from another person through a

purchase. As defined above, “purchase” includes, and thereby enables a person to become an importer of special fuel through, transactions and transfers other than sales. As to purchases through sales in particular, however,

Indiana courts, including [the Indiana Tax Court], refer to the law of sales for assistance in interpreting tax laws that relate to the sale of goods. *See Associated Milk Producers, Inc. v. Indiana Dep’t of State Revenue*, (1987) Ind. Tax, 512 N.E.2d 917, 919, *aff’d*, (1989) Ind., 534 N.E.2d 715; *Indiana Dep’t of State Revenue v. Martin Marietta Corp.* (1979), Ind. App., 398 N.E.2d 1309, 1311. ... [T]he Indiana Uniform Commercial Code (the UCC), IND. CODE 26-1-1-101 *et seq.*, defines a “sale” as “the passing of title from the seller to the buyer for a price (IC 26-1-2-401[(2), which defines when a title passes]).” IND. CODE 26-1-2-106(1).

Monarch Beverage Co. v. Indiana Dep’t of State Revenue, 589 N.E.2d 1209, 1212-13 (Ind. Tax 1992) (bracketed material in original). It is important to note in this connection that the Indiana Supreme Court had already defined a “sale” as being “the transfer of property in a thing for a price in money[]” in a tax opinion that predates the enactment of IC art. 26-1. *Wayne Pump Co. v. Department of Treasury*, 110 N.E.2d 284, 287 (Ind. 1953), cited in *Monarch Beverage, supra*, 589 N.E.2d at 1213. IC § 26-1-2-106(1) and Indiana tax law are therefore in substantial accord as to what a sale of goods is.

The Indiana Supreme Court has since stated in *Associated Milk Producers, Inc.*, cited in the above quotation, that although the “Uniform Commercial Code is not controlling in determining passage of title for purposes of taxation,” 534 N.E.2d at 718, it is “persuasive[.]” *id.* IC ch. 26-1-2 includes default rules to determine when and where delivery occurs and title to goods passes. IC § 26-1-2-401(2), cited in *Monarch Beverage, supra*, states that “[u]nless otherwise explicitly agreed, title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods[.]” *Id.* IC § 26-1-2-308(a) states that “[u]nless otherwise agreed: (a) the place for delivery of goods is the seller’s place of business ... [.]” *Id.* At least one Indiana appellate tax opinion has approved a construction of these statutes as creating a presumption against title passing at the destination of shipped goods and in favor of a “shipping contract” under which title passes at the point of shipment, *i.e.* at the seller’s place of business. *Indiana Dep’t of State Revenue v. Martin Marietta Corp.*, 398 N.E.2d 1309, 1311 and 1313 (Ind. Ct. App. 1979), respectively. Moreover, both before and after Indiana enacted the U.C.C., the Indiana Supreme Court has consistently looked to the seller’s place of business as being the point at which title to sold goods passes and as determining whether a taxed transaction does or does not occur in interstate commerce. *Associated Milk Products, supra*, 534 N.E.2d at 717, following *Gross Income Tax Div. v. Shane Mfg. Co.*, 191 N.E.2d 310, 312 (Ind. 1963); *Indiana Dep’t of State Revenue v. Bendix Aviation Corp.*, 143 N.E.2d 91, 96 (Ind. 1957). In the case of imported special fuel, unless the contract provides otherwise, that place is the out-of-state terminal or bulk plant from which the import originated. If the transferee is to pay a price for the special fuel, then the sale of that

fuel to the transferee is consummated at that time and place. “The fact [that] the payment is deferred, ... is inconsequential. So, too, is the fact [that] the consideration is in kind rather than in legal tender” *Indiana Dep’t of State Revenue v. Hertz Corp.*, 457 N.E.2d 246, 249 (Ind. Ct. App. 1983).

e. The Transportation Criterion

As previously noted, IC § 6-6-2.5-41(f) defines “importer” in relevant part as a person who “cause[s] special fuel to be delivered into Indiana ... *from another state*[.]” (emphasis added). It follows both from this language and the authorities cited above that it is the last point of transit of special fuel outside Indiana that is the point at which an importation of special fuel into Indiana begins. The out-of-state terminal or bulk plant from which the shipment originated is that point if there have been no prior transfers of the fuel in transit. If the transferee at that facility provides, or provides for, the motor vehicle transporting the special fuel to its Indiana destination, and is also completing a sale or some other type of purchase under IC ch. 26-1-2 with the dispensing supplier, then the transferee is also the importer. If, however, the title to or ownership interest is to remain in the transferor and the transferor is to provide, or provide for, the motor vehicle that is to transport the fuel to its Indiana destination, then the transferor is the importer.

f. The Effect of Consignments and Other Agency Relationships on Importer Status

The latter rule also includes, and makes the transferor the importer and liable taxpayer under, a transaction that is a “consignment arrangement.” The Indiana Tax Court defined this term in *Storm, Inc. v. Indiana Dep’t of State Revenue*, 663 N.E.2d 552 (Ind. Tax 1996), an opinion issued under the former special fuel tax law, as follows:

A consignment arrangement is an arrangement involving the delivery of goods to another for the purpose of finding a buyer. *Bischoff v. Thomasson*, 400 So.2d 359, 364 (Ala. 1981). In a consignment arrangement, title to or ownership of consigned goods does not move to or pass through the consignee. *Id.*; see *Welsh v. Kelly-Springfield Tire Co.*, 213 Ind. 188, 197, 12 N.E.2d 254, 258 (1938). Rather, title to or ownership of consigned goods moves or passes directly from the consignor to the buyer. *Bischoff*, 400 So.2d at 364.

660 N.E.2d at 556. Another indicia of a consignment agreement is “control over [the buyer’s] selling price or manner of sale[.]” *Welsh v. Kelly-Springfield Tire Co.*, 12 N.E.2d 254, 258 (Ind. 1938) (emphasis added), cited in the quotation from *Storm*, *supra*. A “consignment agreement” of the kind that *Storm* and *Kelly-Springfield Tire Co.* describe is thus a type of agency relationship. See *Ice Service*, *supra*, 41 N.E.2d at 203 (defining agency in relevant part as “the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control [emphasis added; internal quotation marks omitted]”).

A consignment arrangement is distinguishable from a consignment solely for transport or storage. The consignee is under no duty to sell the special fuel under either of the latter arrangements. (As to a consignment for storage in particular, IC § 6-6-2.5-23 specifically states that “[a] terminal operator shall not be considered a supplier merely because the terminal operator handles special fuel *consigned* to it within a terminal [emphasis added].”) A consignment arrangement is also distinguishable from a “sale or return” as defined in IC § 26-1-2-326(1)(b) and discussed in *Reynolds Metals Co. v. Indiana Dep’t of State Revenue*, 433 N.E.2d 1, 17-18 (Ind. Ct. App. 1982). In a sale or return, “the goods are delivered primarily for resale.” IC § 26-1-2-326(1)(b). (*Hertz Corp.*, *supra*, 457 N.E.2d at 249-50, impliedly held that fuel can be acquired for resale.) A sale or return is a contingent, not an absolute, sale; passage of title to the reseller is subject to “the [original] seller’s engagement to take back the goods (or any commercial unit of goods) in lieu of payment if they fail to be resold.” IC § 26-1-2-326(1)(b), Official Comment 1 (West 1995). However, if the reseller finds an ultimate buyer, title would pass to that buyer through the reseller, which, if it is merchant who deals in goods of the kind entrusted to it, can transfer all of the original seller’s rights in those goods to the ultimate buyer. *Reynolds Metals Co.*, *supra*, 433 N.E.2d at 17, citing IC § 26-1-2-403(2). “[T]itle to or ownership of [the] consigned goods [thus would not] move[] or pass[] directly from the consignor to [that] buyer.” *Storm*, 663 N.E.2d at 556. Neither does the original seller exercise any control over the “selling price or manner of [re]sale[.]” *Kelly-Springfield Tire Co.*, 12 N.E.2d at 258. *Accord*, *Reynolds Metals Co.*, *supra*, 433 N.E.2d at 18.

It follows from the definition of “consignment arrangement” that a consignee of special fuel under such an arrangement cannot be an “importer” as defined by IC § 6-6-2.5-41(f). In that situation the consignee did not “cause special fuel to be delivered into Indiana on the person’s *own* behalf, [or] for the person’s *own* account[.]” *Id* (emphases added). The consignee is acting instead as a factor, *i.e.* as an agent, for the consignor. As discussed above, an agency relationship is one of the circumstances under which the Department will impose special fuel tax on the importer in fact (*i.e.*, the principal) rather than the importer of record (*i.e.*, the agent).

However, the Department does not mean to imply from the foregoing that once a factor consignee locates an Indiana buyer or buyers for that fuel, it has no duty to collect special fuel tax on behalf of the consignor/importer. IC § 6-6-2.5-35(h), added by section 27 of the 1994 amendments, 1994 Ind. Acts at 442, states that “each reseller of special fuel is considered to be a collection agent for this state with respect to that [sic] special fuel tax[.]” The Department administratively construes this language as requiring a consignee factor of special fuel imported into Indiana to collect the special fuel tax from any Indiana buyer or buyers it ultimately finds for that fuel and remit that tax to its consignor. This interpretation of IC § 6-6-2.5-35(h) is, broadly speaking, consistent with the duty of consignees to pay gross income tax on consignment sales. *Department of Treasury v. Spindler Co.*, 51 N.E.2d 363, 365 (Ind. 1943); IC § 6-2.1-2-8.

Neither does the Department mean to suggest that it will identify a liable importer and impose tax on that person based solely on consignment language in the shipping paper,

such as when that paper documents a consignment for transport. However, the law is well settled that the fact that a shipping paper documenting a transaction occurring in interstate commerce uses consignment terminology will not prevent treating the transaction for what it truly is and imposing tax on the appropriate party or parties. In particular, if the facts show that a transfer of goods in interstate commerce was a delivery incident to a sale, then the use of consignment jargon will be ignored, the transaction will be treated as the sale that it truly is, and tax will be imposed accordingly. *Department of Treasury of Ind. v. Wood Preserving Corp.*, 61 S.Ct. 885, 888, (U.S. 1941), citing *Superior Oil Co. v. Mississippi ex rel. Knox*, 50 S.Ct. 169, 170 (U.S. 1930), a gasoline excise tax opinion. By the same logic, these opinions also imply by negative inference that the use of consignment labels will not result in imposing tax on a party who, viewing the transaction for what it really is, would not be liable for it.

Indiana tax law likewise treats transactions according to their substance, not their form. *Monarch Beverage, supra*, 589 N.E.2d at 1215 and cases there cited. This rule also applies to agency relationships. “In determining whether an agreement between parties is a sale or whether it is a mere contract of agency, ... the courts will ignore apparently inconsistent language used, and look to the real nature of the agreement[.]” *Ice Service, supra*, 41 N.E.2d at 204 (internal quotation marks omitted). “The primary test whether a transaction in the form of an agency to sell or consignment created the relation of buyer and seller or one of principal and agent was the intention of the parties to be gathered from the whole scope and effect of the language used.” *Reynolds Metals Co., supra*, 433 N.E.2d at 18.

Accordingly, the Department will identify and impose tax on the importer of special fuel according to the true nature of the transaction. Notwithstanding the use of consignment jargon in the shipping paper, if the underlying facts do not otherwise indicate that a transaction in imported special fuel is an agency “consignment arrangement” as defined by *Storm and Kelly-Springfield Tire Co.*, the Department will not treat it as such. In particular, and not by way of limitation, if the facts show that the putative “consignee” was obligated to pay a price for the special fuel, then the Department will treat the transaction as a sale. “The transfer of the property for a price is the essence of [a sales] transaction[.]” *Wayne Pump Co., supra*, 110 N.E.2d at 287. A sale is “inconsistent with the theory of a ‘consignment agreement.’” *Kelly-Springfield Tire Co., supra*, 12 N.E.2d at 258. The Department will therefore treat the putative “consignee” as the buyer if it is obligated to pay for the special fuel, either absolutely or upon resale. That buyer is also the importer if it meets the point of delivery and transportation criteria previously set out above.

5. Application of the Importer-In-Fact Criteria to the Taxpayer’s Transactions With Customers A—D at Terminals 2—4

a. The Ownership Interest/Possession Criteria

As discussed in the Statement of Facts, the taxpayer submitted in evidence copies of each terminal-issued shipping paper covering a shipment of special fuel removed from Terminals 2, 3 and 4 and transferred to Customers A—D on which tax was assessed. Each such shipping paper describes each respective transferee of that fuel as a

“Consignee” and has a notation on it reading “F.O.B. [Terminal 1]” (sic) or for “[Terminal 1] PLT pick up” (sic). Read in isolation, these shipping papers could make it appear that the relationship between the taxpayer and the transferee in question was that of an agency consignment arrangement under which the transferee was to find a buyer for the fuel in Indiana. However, the taxpayer also issued invoices to all five transferees for each respective quantity of special fuel removed from a terminal rack simultaneously with each such removal. The Department has no evidence that any of the customers did not pay any of the invoices. In addition, each terminal-issued paper for each shipment stated below the title in capital letters that “[i]f this document evidences a delivery into shipper’s truck or into consignee’s truck, it is not a bill of lading, but consignee’s receipt for the delivery.” Thus, each removal of special fuel was a “sale” as defined under both IC § 26-1-2-106(1) and *Wayne Pump Co.*, rather than a “consignment arrangement” as defined by *Storm and Kelly-Springfield Tire Co.*, all of which were discussed *supra*. Title to each shipment passed from the taxpayer to each respective customer at the point of shipment, *i.e.* at the terminal, under IC §§ 26-1-2-308(a) and -2-401(2) and *Martin Marietta*, also discussed *supra*. The fact that these transactions were point of shipment sales means that Customers A—D were acting on their own respective behalves or accounts with respect to the import transactions to which those customers were parties, and not as the taxpayer’s agents. The shipping instructions referring to Terminal 1 were therefore surplusage under the rule of *Wood Preserving Corp.* and *Superior Oil Co.*, both cited *supra*. Those instructions therefore should not have been used as evidence on which to base assessments on these transactions. At most, the shipping instructions may have indicated that the respective fuel shipments to which those receipts refer may have been the subjects of sale or return contracts, which for the reasons previously discussed above are not true consignment arrangements.

b. The Point of Transfer of Ownership and Transportation Criteria

Ownership aside, the Department must also address the questions of the point of transfer of ownership and transportation of the fuel to determine the identity of the liable importer or importers. The field auditor during the audit did not acquire, and the taxpayer during this protest has not submitted, any evidence of the parties’ agreement or agreements for these sales, and in particular where title to the imported fuel was to pass, other than the fuel receipts. In the absence of any such evidence, the Department will therefore presume that IC § 26-1-2-401(2) governs where title passed to each imported special fuel shipment of which Customers A—D took possession. By operation of that statute, title to each such shipment thus passed to the customer concerned at the place of business of the taxpayer at which it completed physical delivery of that fuel to that customer. In other words, title to the imported special fuel shipments of which Customers A—D took possession passed to them at Terminals 2, 3 and 4, from which the taxpayer dispensed the fuel or caused it to be dispensed. Those terminals are all located in the adjoining state, not Indiana. As previously noted, the seller’s place of business controls where title to or an ownership interest in goods passes for both commercial and Indiana tax law purposes. *Associated Milk Products*, *supra*, 534 N.E.2d at 717, following *Shane Mfg. Co.*, *supra*, 191 N.E.2d at 312. In addition, the freight terms on each shipping paper were “[c]ollect.” Consistent with that term, Customers A—D each transported each respective quantity of

special fuel removed from Terminals 2, 3 and 4 in their own trucks or the transport trucks of the common carrier that Customer A employed for the removals it purchased. There is no evidence that any of the fuel was resold or reloaded into other transport before any importation occurred.

c. Conclusion: The Taxpayer Did Not Enter Into Indiana, and Is Not the Importer, of the Pre-Election Removals from Terminals 2—4 Sold to Customers A—D.

Therefore, evidence of diversion to out-of-state destinations aside, if anyone was the “ent[er]er into Indiana,” or importer, of the special fuel constituting the pre-election removals from Terminals 2, 3 and 4, it was not the present taxpayer. “[A]t the time the manufactured articles were loaded on the [customers’ transport] at the [taxpayer’s] plants . . . , title and possession passed from [the taxpayer] to the [customer], and all control over its [sic] movement passed from [the taxpayer].” *Bendix Aviation Corp.*, *supra*, 143 N.E.2d at 96. *Cf. First Nat’l Leasing and Fin. Corp. v. Indiana Dep’t of State Revenue*, 598 N.E.2d 640, 644-45 (Ind. Tax 1992) (reversing a gross income tax assessment on lease receipts of a lessor of equipment located in Indiana, but over which the lessor exerted no control). The enterers or importers, if any, of those removals were Customers A—D, who as such would each have been liable for any special fuel tax that might have been due on their respective unreported imports. The questions of whether the assessed imports arrived in Indiana, as the field auditor believed, or were even brought into Indiana, which the taxpayer disputes, are thus largely beside the point as to this part of the taxpayer’s assessment. However, as will be mentioned below, they do have some bearing as to the fuel removed from Terminal 4 and transferred to Customer E.

6. The Fuel That the Taxpayer Sold to Customer E
From Terminal 4 Was Not Entered Into Indiana.

It is necessary for the Department to separately address the question of importer status as to the taxpayer’s pre-election fuel transfers from Terminal 4 to Customer E because the taxpayer submitted somewhat different evidence as to them than it did with respect to Customers A—D. As it did with respect to those customers, the taxpayer did submit copies of the invoices it issued to Customer E concerning the special fuel removed from Terminal 4 on its behalf. Those transactions were therefore also sales for the same reasons previously given in connection with the out-of-state removals of special fuel transferred to Customers A—D. However, the taxpayer did not submit in evidence any of the shipping papers for its out-of-state fuel transfers to Customer E. Moreover, the invoices that the taxpayer issued each recite the shipping address for Customer E not as being Terminal 1, but as being an address in the city in Indiana, although at a different location than, where Customer E’s principal place of business is located. If these invoices were the only evidence the taxpayer had submitted with respect to its transactions with Customer E, then the Department would be forced to view those transactions as destination contracts rather than shipping contracts and hold the taxpayer liable as the enterer or importer.

However, the taxpayer also submitted photocopies of invoices that Customer E's common carrier had issued for its services. In addition, the taxpayer submitted copies of invoices that Customer E had issued to the three repurchasers of that fuel (one of which was also Customer E's common carrier). All of the invoices of Customer E and its common carrier list delivery addresses for the special fuel at places of business located in the city located in the third, non-adjointing state. A glance at a road map of the relevant geographical area suggests that it is highly unlikely that Customer E had the fuel that it bought at Terminal 4 delivered to it first at the Indiana shipping address shown on the invoices the taxpayer issued. Terminal 4 is in close physical proximity to the city where the repurchasers' delivery addresses are located. In contrast, not only is Indiana in the opposite direction measured from Terminal 4, but the shipping address on the taxpayer's invoices to Customer E is in a city on the far side of Indiana in relation to Terminal 4 and the repurchasers' delivery addresses. Having the fuel shipped to Customer E in Indiana first would have more than doubled the mileage the fuel would have been in transit, with a corresponding increase in Customer E's transportation expense. The Department therefore infers that the transactions between the taxpayer and Customer E concerning fuel removed from Terminal 4 were, like those of the other four customers, shipping contracts in which title to the fuel passed to Customer E at the rack of Terminal 4. Not only was the taxpayer not the liable enterer or importer of that fuel but also, given the previously recited geography, it is highly unlikely that any importation of that fuel into Indiana by anyone even occurred.

7. Conclusion

For all of the foregoing reasons, the field auditor erred in assessing the taxpayer on the special fuel removed from Terminals 2, 3 and 4 before September 22, 1994, when the Department received the taxpayer's election to begin withholding special fuel tax on out-of-state removals to be imported into Indiana. The Board correspondingly erred in denying the taxpayer's protest as to the part of the assessment levied on the pre-election removals from those terminals. The taxpayer was not the importer of any of that fuel. The Type 2-receipt clause of IC § 6-6-2.5-20 therefore does not support this part of the assessment.

H. THE TAXPAYER IS LIABLE FOR THE TAX ON THE POST-ELECTION REMOVALS AS THE SUPPLIER OF THOSE REMOVALS.

1. Introduction— The Taxpayer's Diversion Argument

The taxpayer also did not precollect tax on post-election removals of special fuel transferred to Customers A—E from Terminals 2, 3 and 4 and the respective shipping papers for which displayed Indiana destinations. The taxpayer now argues that it should not have been assessed tax on that fuel in the audit. It claims that the evidence it has submitted shows that those shipments never arrived in Indiana because the customers diverted them to various destinations in, and that in addition Customer A paid fuel tax to the adjoining state on its shipments to, the adjoining state. (The taxpayer has also

advanced this argument against assessing the disallowed exports, which the Department also will discuss below.)

The taxpayer has argued that the event on which its liability for tax on the unreported imports turns is whether that special fuel was physically “entered into Indiana” under IC § 6-6-2.5-28(d) as analogized to “entry into the United States” under I.R.C. § 4081(a)(1)(A)(iii). However, for the reasons the Department has previously discussed, it has rejected the taxpayer’s physical entry argument and found that if anyone was the importer or enterer of the pre-election removals, it was the taxpayer’s customers, not the taxpayer. Those customers were solely liable for that tax under the Type 2-receipt clause of IC § 6-6-2.5-20, and also under IC § 6-6-2.5-35(i) on and after July 1, 1994, until September 21, 1994, the day before the Department received the taxpayer’s Form SF-10A. Before the Department received that election the taxpayer was not under any independent duties as a licensed supplier to collect and remit the special fuel tax on its out-of-state terminal removals destined for Indiana. It was thus largely unnecessary for the Department to reach the question of whether any of those removals had been diverted from Indiana because the taxpayer was not liable for the tax on them in any case.

2. The Taxpayer Had Duties to Collect and Remit the Special Fuel Tax on the Post-Election Unreported Imports and the Disallowed Exports.

a. Introduction.

For the reasons given below, however, the taxpayer *did* have legal duties to collect and remit the special fuel tax on the post-election removals and the disallowed exports, in contrast to the pre-election removals. The taxpayer does not dispute, as a factual matter, that it failed to collect and remit the tax on these transactions. The Department therefore must determine whether the taxpayer can use its diversion argument as a defense against these parts of the assessments. However, this question must be decided in relation to the taxpayer’s presumptive liability under the Special Fuel Tax Law for the tax on the post-election removals and the disallowed exports. The Department will therefore discuss the latter subject before turning to the diversion argument.

b. The Taxpayer’s Removals of the Post-Election Unreported Imports and the Disallowed Exports From Its Terminals Are the Only Acts of Receipt of Special Fuel In Which It Engaged.

The only physical acts concerning the post-election removals and the disallowed exports engaged in by the taxpayer (as distinguished from its customers) were its respective transfers of that fuel from the originating terminal into the customer’s transport truck. Each of these transfers was a “removal” as I.R.C. § 4083(b) and Treas. Reg. § 48.4081-1(b) define that word. In other words, the only taxable events in which the taxpayer engaged concerning, and which made it liable for special fuel tax on, the disallowed exports and the post-election removals are exactly that, the removals of that fuel from those terminals. In terms of the Department’s previous analysis of when special fuel is “received” under IC § 6-6-2.5-20 and presumptively subject to tax, the taxpayer is a Type

1 recipient. For the reasons set out below, it is a Type 1A recipient with respect to the disallowed exports and a Type 1B recipient with respect to the post-election unreported imports. Although slightly premature in terms of the issues that this protest presents, the Department will include the disallowed exports in the following discussion because doing so will provide the foundation for the analysis of the post-election unreported imports.

*c. Special Fuel Tax Is Imposed on Every Type 1 Receipt
Upon Their Removals From the Terminals' Racks.*

- (i) A Type 1 Receipt of Special Fuel Occurs Upon the Nonbulk Removal of Undyed Special Fuel at the Rack of a Terminal That Is, or Is Treated as Though It Is, in Indiana.

IC § 6-6-2.5-35(a) states that “[t]he tax on special fuel *received* by a licensed supplier in Indiana that is imposed by section 28 of this chapter shall be collected and remitted to the state by the supplier who *receives* taxable gallons” *Id* (emphases added). As previously discussed above, the taxable event under the Special Fuel Tax Law occurs when special fuel is “received” as IC § 6-6-2.5-20 defines that word. Special fuel is received upon, among other events, “the removal from any ... terminal in Indiana [or any terminal treated as though it were in Indiana under IC § 6-6-2.5-35(j)], ... of any special fuel for consumption, use, sale or warehousing, ... [,]” *id.*, *i.e.* Type 1 receipt as discussed earlier. IC § 6-6-2.5-20 then goes on to state immediately thereafter that

[t]he tax imposed under section 28 of this chapter with respect to special fuel removed from terminals within Indiana and with respect to special fuel which is the subject of a tax precollection agreement pursuant to section 35(j) of this chapter, shall be imposed *at the same time and in the same manner* as the tax imposed by Sections 4081 to 4083 of the Internal Revenue Code.

(Emphasis added.) IC § 6-6-2.5-28(c) contains almost the same language. It states that “the tax imposed on special fuel by subsection [28](a) ... shall generally be determined in the same manner as the tax imposed by Section 4081 of the Internal Revenue Code” *Id.*

As previously discussed above, the IRS in Treas. Reg. § 48.4081-2 interpreted I.R.C. § 4081(a)(1)(A)(ii) as imposing the federal fuel manufacturers’ excise tax upon removal of taxable fuel from a terminal rack. Consistent with this federal interpretation, the Department administratively construes IC § 6-6-2.5-20 as also meaning that a Type 1 receipt occurs upon the nonbulk removal of undyed special fuel at the rack of a terminal which that section describes. Specifically, a Type 1 receipt occurs upon the nonbulk removal of undyed special fuel at the rack of a terminal in Indiana, or the rack of a terminal outside Indiana if that removal is treated under IC § 6-6-2.5-35(j) (as construed below) as though it occurred in Indiana. Fuel so removed is presumptively subject to

imposition of Indiana special fuel tax under the Department's earlier discussion of that subject.

(ii) A “Nonbulk Removal” of Special Fuel From a Terminal Occurs When
Special Fuel Is Dispensed From a Rack Into a Truck's Transport Tank.

Under the Department's interpretation of IC § 6-6-2.5-20 as imposing special fuel tax on nonbulk removals of undyed fuel from a terminal at the rack, “nonbulk removal” includes, but is not limited to, the dispensing of special fuel into truck transport tanks. Transfer of taxable fuel by truck is not a “bulk transfer,” and fuel in the transport tanks of such trucks is outside the “bulk transfer/terminal system,” both as defined in Treas. Reg. § 48.4081-1(b). In addition, that regulation defines a “rack” as “a mechanism for delivering taxable fuel from a refinery or terminal into a *truck, trailer, railroad car, or other means of nonbulk transfer.*” *Id* (emphases added). The last definition is somewhat more general than the Indiana definition of “rack.” IC § 6-6-2.5-19 defines a “rack” as “a dock, a platform, or an open bay with a series of metered pipes and hoses for delivering special fuel from a refinery or terminal into a motor vehicle, rail car, or marine vessel.” *Id*. However, the Department construes these differences as being immaterial for purposes of determining whether a dispensing of special fuel removed from a terminal and dispensed into a truck transport tank is a Type 1 receipt. It is the fact that a transfer from a terminal was not in bulk, not the mechanical components or dispensing capabilities of the device used to make that transfer, that controls whether that removal is a Type 1 receipt.

(iii) The Supplier Is the Type 1 Recipient.

IC § 6-6-2.5-28(c) states in part that

the tax imposed on special fuel by subsection [28](a) shall be measured by invoiced gallons of nonexempt special fuel received *by a licensed supplier* in Indiana for sale or resale in Indiana or with respect to special fuel subject to a tax precollection agreement under section 35(d) [sic] of this chapter, such special fuel removed *by a licensed supplier* from a terminal outside of Indiana for sale for export or for export to Indiana

Id (emphases added). (The Department considers the reference in IC § 6-6-2.5-28(c) to “a tax precollection agreement under section 35(d)” to be a technical error, given the context, and therefore administratively construes “section 35(d)” as referring to section 35(j). *Accord, see Cummins v. Pence, supra*, 91 N.E. at 532 (construing the misnumbering of a statute section in another statute as an inadvertence). As the Department will discuss below, it considers tax precollection agreements and elections under IC § 6-6-2.5-35(j) to be equivalent for purposes of imposing special fuel tax liability on licensed suppliers and permissive suppliers.)

The Type 1 recipient, and the person initially liable for the payment of the tax, is thus the supplier. With certain technical corrections, and one substantive clarification, made by section 19 of the 1994 amendments, IC § 6-6-2.5-23 defines the word “supplier” as follows:

6-6-2.5-23 “Supplier” defined

Sec. 23. As used in this chapter, “supplier” means a person that imports or acquires immediately upon import into Indiana special fuel by ~~motor vehicle~~, pipeline or marine vessel from within a state, territory, or possession of the United States into a terminal or that imports special fuel into Indiana from a foreign country, or that produces, manufactures or refines special fuel within Indiana, **or that owns special fuel in the pipeline and terminal distribution system in Indiana**, and is subject to the general taxing or police jurisdiction of Indiana, and in any case is also registered under Section 4101 of the Internal Revenue Code ~~as it existed on January 1, 1992~~, for ~~tax free~~ transactions in **gasoline taxable motor fuels in the bulk distribution system**. A terminal operator shall not be considered a supplier merely because the terminal operator handles special fuel consigned to it within a terminal.

1994 Ind. Acts at 436 (strikeouts and boldface in original).

(iv) The Supplier as a Type 1 Recipient Has
Duties to Collect and Remit Special Fuel Tax.

IC § 6-6-2.5-35(a), quoted above, and the second sentence of IC § 6-6-2.5-35(i), discussed below, require the supplier receiving special fuel to collect that tax and remit it to the Department. The first sentence of IC § 6-6-2.5-35(c) identifies the party from whom the supplier is to collect the tax in the case of removals for sale in particular. It specifically requires “[a] supplier who sells special fuel [to] collect *from the purchaser* the special fuel tax imposed under section 28 of this chapter.” *Id* (emphasis added.) In the case of the disallowed exports, the taxpayer did not need to take any action beyond removing each such shipment from Terminal 1 to subject itself to these duties.

*d. The Taxpayer’s Election Under IC § 6-6-2.5-35(j)
Subjected It to Liability for, and Duties to
Precollect and Remit, Special Fuel Tax on the
Post-Election Unreported Imports.*

(i) The Taxpayer’s Election Under, and the Effect of, IC § 6-6-2.5-35(j)

However, the taxpayer did not become liable for special fuel tax on the unreported imports until one additional fact occurred. As noted in the Statement of Facts, the Department on September 22, 1994 received a Form SF-10A submitted by the taxpayer

on which it checked option 1. In the words of that option, the taxpayer “agree[d] to treat all out-of-state terminal removals of undyed special fuel, for export into Indiana, as if they were received in Indiana, and [to] collect the Indiana special fuel tax from every purchaser.” *Id.* The taxpayer did so pursuant to IC § 6-6-2.5-35(j). As it read on the date of the taxpayer’s election, IC § 6-6-2.5-35(j) stated that:

(j) The department, a licensed importer, the reseller to a licensed importer, and a licensed supplier or permissive supplier may jointly enter into an agreement for the licensed supplier or permissive supplier to precollect and remit the tax imposed by this chapter with respect to special fuel imported from a terminal outside of Indiana *in the same manner and at the same time as the tax would arise and be paid under this chapter if the special fuel had been received by the licensed supplier or permissive supplier at a terminal in Indiana.* If the supplier is also the importer, the agreement shall be entered into between the supplier and the department. However, any licensed supplier or permissive supplier may make an election with the department to treat all out-of-state terminal removals with an Indiana destination as shown on the terminal-issued shipping paper *as if the removals were received by the supplier in Indiana pursuant to sections 28 and 35(a) of this chapter, for all purposes. In this case, the election and notice of the election to a supplier’s customers shall operate instead of a three (3) party precollection agreement.* The department may impose requirements reasonably necessary for the enforcement of this subsection.

(Emphases added.)

- (ii) Tax Precollection Agreements and Elections Under IC § 6-6-2.5-35(j) Both Impose Duties on the Licensed or Permissive Supplier to Precollect and Remit Tax on Removals Destined for Indiana From an Out-of-State Terminal.

The Department administratively construes the last emphasized sentence in the above quotation as making an election such as the taxpayer’s the equivalent of an agreement of the kind described earlier in IC § 6-6-2.5-35(j). Current IC §§ 6-6-2.5-20, -28(c) and -35(i), which the Department will discuss below, refer to tax precollection agreements, but not to elections to precollect tax. However, either mechanism that IC § 6-6-2.5-35(j) describes enables a supplier or permissive supplier who so chooses to assume duties to precollect and remit tax on special fuel removed from out-of-state terminals and that the shipping paper shows is destined for Indiana. There is no basis for distinguishing between the two mechanisms to determine whether a supplier or permissive supplier has assumed and is subject to those duties (as distinguished from how those duties arose or the scope of those duties). Accordingly, the Department will interpret the references in current IC §§ 6-6-2.5-20 -28(c) and -35(i) to tax precollection agreements as including elections to precollect tax as well.

(iii) A Removal of Special Fuel Subject to IC § 6-6-2.5-35(j) Is a Type 1 Receipt of Special Fuel.

As previously stated, the Department construes the removal of special fuel subject to an agreement or election under IC § 6-6-2.5-35(j) as being taxable as a form of Type 1 receipt. The Department has arrived at this construction for several reasons. First, the definition of “received” in current IC § 6-6-2.5-20, quoted earlier in this letter, explicitly refers in the same sentence to both “special fuel removed from terminals within Indiana and ... special fuel which is the subject of a tax precollection agreement pursuant to section 35(j) of this chapter[.]” *id.* (As previously noted, the Department administratively construes the latter phrase as also including special fuel that is the subject of a supplier’s election under IC § 6-6-2.5-35(j).) It is thus apparent that current IC § 6-6-2.5-20 treats removals from in-state terminals and removals subject to IC § 6-6-2.5-35(j) as being equivalent acts of receipt.

Second, the language used in both of the above-emphasized parts of IC § 6-6-2.5-35(j) acts in the same way by creating a fiction of treating special fuel transferred thereunder as if it had been received in Indiana. Specifically, IC § 6-6-2.5-35(j) treats a removal that is subject to that subsection as though it were removed from an in-state terminal, the only form of receipt under IC § 6-6-2.5-20 to which it is comparable. Therefore, a removal from an in-state terminal (a Type 1A receipt under the Department’s prior analysis of IC § 6-6-2.5-20) and a removal of special fuel that is subject to IC § 6-6-2.5-35(j) (*i.e.*, a Type 1B receipt) are equivalent taxable events. If a supplier or permissive supplier employs one of the mechanisms described in IC § 6-6-2.5-35(j), as the taxpayer did by making its election, it thus eliminates any legal distinction between these two forms of removal. Any special fuel that the supplier or permissive supplier thereafter removes from an out-of-state terminal and which the shipping paper shows is destined for Indiana would be treated as removed from a terminal in Indiana and, as such, presumptively subject to tax.

Third, I.R.C. § 4081 as incorporated into the Special Fuel Tax Law causes the latter tax to be imposed both on removals from in-state terminals and removals that are subject to IC § 6-6-2.5-35(j). As the Department discussed above, current IC §§ 6-6-2.5-20 and -28(c) both impose special fuel tax in the same manner as the federal fuel manufacturers’ excise tax imposed by I.R.C. § 4081. I.R.C. § 4081(a)(1)(A)(ii) imposes the federal tax on a removal of taxable fuel from “any terminal[.]” *id.* Special fuel tax is therefore also imposed upon the removal of fuel from any in-state terminal. However, both current IC §§ 6-6-2.5-20 and -28(c) are also specific that special fuel tax be imposed on special fuel originating from an out-of-state terminal pursuant to IC § 6-6-2.5-35(j) in the same manner as I.R.C. § 4081 would impose the federal tax on that fuel. Current IC § 6-6-2.5-20 mentions “tax precollection agreement[s] pursuant to section 35(j) of this chapter,” *id.*, while current IC § 6-6-2.5-28(c) mentions “tax precollection agreement[s] under section 35(d) of this chapter,” *id.* (The Department has previously construed these references as also including elections under IC § 6-6-2.5-35(j), and has also construed the mention of “section 35(d)” in current IC § 6-6-2.5-28(c) as referring to IC § 6-6-2.5-35(j).) Thus, special fuel is from an in-state terminal or from an out-of-state terminal and subject to IC

§ 6-6-2.5-35(j), Indiana special fuel tax must be imposed on that fuel upon the removal of that fuel from the originating terminal. IC § 6-6-2.5-35(j) itself indirectly requires the same result. It states that removals from out-of-state terminals of a supplier or permissive supplier who makes an election thereunder will be treated as being received in Indiana pursuant to IC §§ 6-6-2.5-28 and -35(a). An election under IC § 6-6-2.5-35(j) therefore subjects such removals to imposition of Indiana special fuel tax in the same manner as under IC § 6-6-2.5-28(c), which in turn, as noted above, incorporates the general imposition criteria of I.R.C. § 4081 (including the regulations interpreting it). I.R.C. § 4081(a)(1)(A)(ii) as incorporated into IC § 6-6-2.5-28(c) requires Indiana special fuel tax to be imposed upon removal of special fuel from an in-state terminal, as the Department also stated above. Therefore, that tax must also be imposed on special fuel subject to IC § 6-6-2.5-35(j) upon removal of such fuel from an out-of-state terminal. Thus, whether analyzed under IC §§ 6-6-2.5-20, -28(c) or -35(j), I.R.C. § 4081(a)(1)(A)(ii) makes removal the taxable event for both transfers of special fuel at in-state terminals and transfers at out-of-state terminals of the kind that IC § 6-6-2.5-35(j) describes. Such removals are therefore equivalent acts of receipt for this reason as well. For all of the foregoing reasons, the Department construes IC § 6-6-2.5-20 as making the removal of special fuel under an agreement or an election described in IC § 6-6-2.5-35(j) a Type 1 (specifically a Type 1B) receipt.

(iv) Special Fuel Tax Is Imposed on
Type 1B Receipts of Special Fuel at the
Rack of the Out-of-State Terminal.

The Department earlier administratively construed IC § 6-6-2.5-20 as imposing special fuel tax on all Type 1 receipts at the rack of the terminal from which the fuel was removed, consistent with I.R.C. § 4081(a)(1)(A)(ii) as interpreted in Treas. Reg. § 48.4081-2. Both IC §§ 6-6-2.5-20 and -35(j) require Indiana special fuel tax to be imposed on fuel subject to the latter subsection in particular at the rack of an out-of-state terminal from which such fuel is removed. Under IC § 6-6-2.5-20 “special fuel which is the subject of a tax precollection agreement pursuant to section 35(j) of this chapter[] shall be imposed *at the same time* and in the same manner as the tax imposed by Sections 4081 to 4083 of the Internal Revenue Code.” *Id* (emphasis added). IC § 6-6-2.5-35(j) in turn authorizes agreements

to precollect and remit the tax imposed by this chapter with respect to special fuel imported from a terminal outside of Indiana in the same manner *and at the same time* as the tax would arise and be paid under this chapter if the special fuel had been received by the licensed supplier or permissive supplier at a terminal in Indiana.

Id (emphasis added). The Department construes these references to time as describing the point at which the removal of fuel from a terminal occurs, *i.e.* at the rack of that terminal. Removals of special fuel from in-state terminals and of special fuel described in IC § 6-6-2.5-35(j) from out-of-state terminals are both Type 1 receipts of special fuel

and as such are equally subject to imposition of special fuel tax for the reasons set out above. The Department also earlier construed IC § 6-6-2.5-35(j) as making an election and a tax precollection agreement under that subsection equivalent. These interpretations further require Indiana special fuel tax on a removal from an out-of-state terminal that is subject to IC § 6-6-2.5-35(j) on any basis to be imposed at the same point when removal from an in-state terminal would happen, at the rack of the terminal. Accordingly, and consistent with these earlier interpretations, the Department further administratively construes IC §§ 6-6-2.5-20 and -35(j) as imposing Indiana special fuel tax on fuel described in the latter statute at the out-of-state terminal's rack.

(v) IC § 6-6-2.5-35(i) Makes Suppliers That Choose to Precollect and Remit Special Fuel Tax Under IC § 6-6-2.5-35(j) Jointly Liable With the Importer for That Tax.

IC § 6-6-2.5-35(j) is particularly explicit as regards the effect of an election. It states in relevant part that “any licensed supplier or permissive supplier may make an election with the department to treat all out-of-state terminal removals with an Indiana destination as shown on the terminal-issued shipping paper *as if the removals were received by the supplier in Indiana pursuant to sections 28 and 35(a) of this chapter, for all purposes.*” *Id* (emphasis added). In other words, when a licensed or permissive supplier makes such an election, it also consents to the liability and duties that IC §§ 6-6-2.5-28 and -35(a) specify upon a receipt of special fuel. Thus, a licensed or permissive supplier that makes an election under IC § 6-6-2.5-35(j) thereby consents to the imposition of special fuel tax pursuant to IC § 6-6-2.5-28 upon the removal of special fuel from an out-of-state terminal shown as being destined for Indiana. It also makes itself liable for the tax on that fuel as the receiving supplier and assumes duties to invoice, precollect and remit Indiana special fuel tax on the gallons it has so received. This liability and these duties exist not only under IC §§ 6-6-2.5-28 and -35(a), but also under IC § 6-6-2.5-35(i), which became applicable upon the present taxpayer's election as well. As previously discussed, the first sentence of the latter subsection makes importers liable for the tax on imported special fuel. However, IC § 6-6-2.5-35(i) then goes on to state that

if the importer and the importer's reseller have previously entered into a tax precollection agreement as described in subsection (j), and the agreement remains in effect, *the supplier with whom the agreement has been made shall become jointly liable with the importer for the tax and shall remit the tax to the department on behalf of the importer.*

(Emphasis added.) As the Department previously discussed above, it construes IC § 6-6-2.5-35(j) as making a tax collection agreement and an election thereunder equivalent for purposes of precollecting and remitting Indiana special fuel tax on removals from out-of-state terminals. By logical extension, a tax collection agreement and an election under IC § 6-6-2.5-35(j) also should be equivalent events imposing joint liability for the tax on the supplier under IC § 6-6-2.5-35(i). The Department therefore administratively construes the phrase “tax precollection agreement as described in subsection (j)” in IC § 6-6-2.5-

35(i) as including a supplier's election to precollect and remit tax on all removals from its out-of-state terminals. The Department further construes IC § 6-6-2.5-35(i) as making the supplier jointly liable for the tax if it has assumed any duties under IC § 6-6-2.5-35(j) to precollect and remit tax on out-of-state removals, regardless of the means by which it did so under the latter subsection.

(vi) The Taxpayer Had Duties to Collect and Remit Indiana Special Fuel Tax on Every Type 1 Receipt of a Disallowed Export or a Post-Election Unreported Import.

The present taxpayer was liable by operation of IC § 6-6-2.5-35(a) and the first sentence of IC § 6-6-2.5-35(c) to collect and remit special fuel tax on every nonbulk removal of fuel from the rack of any terminals in Indiana in which it maintained inventory positions. It also made an election under IC § 6-6-2.5-35(j) to collect and remit special fuel tax on all nonbulk removals from its out-of-state terminals that showed Indiana destinations on their respective shipping papers. The taxpayer thus made itself jointly liable under IC § 6-6-2.5-35(i) for the tax on all such removals along with its respective importing customers. The taxpayer also had duties to collect and remit special fuel tax to the Department on any removals from out-of-state terminals under IC §§ 6-6-2.5-35(a) and (i) on behalf of those customers.

The taxpayer removed each of the disallowed exports and the post-election unreported imports from one of its terminals for sale to a customer and dispensed it into the transport tank of that customer's truck. As discussed above, transport by truck is not a recognized method of tax-free bulk transfer under the federal fuel manufacturers' excise tax. Each removal for transport by truck was therefore subject to imposition of that tax at the rack of the terminal from which the fuel was removed by virtue of I.R.C. § 4081(a)(1)(A)(ii) as interpreted in Treas. Reg. § 48.4081-2. IC § 6-6-2.5-28(c) imposes the special fuel tax in the same general manner, and IC § 6-6-2.5-20 does so in particular on removals of fuel from terminals in Indiana and out-of-state terminals subject to IC § 6-6-2.5-35(j) at the same time and in the same manner, as the federal tax. Customers A—E were liable as importers for the tax on the of any post-election removals from Terminals 2—4 that they entered into Indiana for the same reasons the Department gave earlier in this letter regarding the pre-election removals. However, each removal of a post-election unreported import was also as to the taxpayer a Type 1 receipt of special fuel. The disallowed exports were also Type 1 receipts. As such, the post-election unreported imports and the disallowed exports were presumptively subject to imposition of Indiana special fuel tax at the rack of the terminal from which they were respectively removed. As the supplier of that fuel, the taxpayer therefore was liable under IC §§ 6-6-2.5-20, -28, and (as to the post-election unreported imports) -35(i) for the special fuel tax on each removal subject to that tax. It also had duties to collect and remit that tax to the Department under IC § 6-6-2.5-35(a), the first sentence of IC § 6-6-2.5-35(c), and IC § 6-6-2.5-35(i).

(vii) The Taxpayer and Its Customers Engaged In Different Activities Having Different Special Fuel Tax Consequences.

The actions of the customers and the taxpayer of importance for purposes of this protest differ. The customers were exporters as to any fuel that they in fact transported out of Indiana and Type 2 recipients as to any entries into Indiana of post-election unreported imports that they respectively effected. The events having tax significance for them were any such movements, not the removals of the fuel from the taxpayer's terminals. In contrast, the taxpayer is a Type 1 recipient for the reasons the Department gave immediately above. The taxable events for the taxpayer were its removals, which necessarily occurred before any delivery or diversion from delivery of that fuel to an Indiana destination by its customers. Those customers, not the taxpayer, owned the fuel once it left the racks of its terminals nor could the taxpayer control their respective movements of that fuel because they were not the taxpayer's agents. These distinctions as to the parties' activities and the taxpayer's later lack of control over the fuel, which also apply to the disallowed exports, are critical to the taxpayer's diversion argument, to which the Department now turns.

3. Administrative Remedies Under the Special Fuel Tax Law for Diverted Shipments

The provisions of the Special Fuel Tax Law that deal with diverted special fuel shipments are IC § 6-6-2.5-40(f) and (g). During the post-election period those subsections read, and still read, as follows:

(f) The department shall provide for relief in a case where a shipment of special fuel is *legitimately* diverted from the represented destination state after the shipping paper has been issued by the terminal operator or where the terminal operator failed to cause proper information to be printed on the shipping paper. These relief provisions shall include a provision requiring that the shipper or its agent provide notification before the diversion or correction to the department if an intended diversion or correction is to occur, and *the relief provision shall be consistent with the refund provisions of this chapter* [in IC § 6-6-2.5-32(c) to (e)].

(g) The supplier and the terminal operator shall be entitled to rely for all purposes of this chapter on the representation by the shipper or the shipper's agent as to the shipper's intended state of destination or tax exempt use. The shipper, the importer, the transporter, the shipper's agent, and any purchaser, not the supplier or terminal operator, shall be jointly liable for *any tax otherwise due to the state as a result of a diversion of the special fuel from the represented destination state*.

Id (emphases added). Unlike IC § 6-6-2.5-40(f), discussed below, IC § 6-6-2.5-40(g) does not specify the administrative remedy available to the parties who are potentially

liable for the special fuel tax on the diverted shipment. However, the above-emphasized language in IC § 6-6-2.5-40(g) necessarily implies that no Indiana special fuel tax had been previously paid on the diversion in question, since the original destination of the shipment was in a state other than Indiana. Therefore, the applicable administrative remedy would necessarily have to be by protest rather than by refund claim. However, the same above-emphasized language in IC § 6-6-2.5-40(g) makes it clear that this subsection only applies to diversions of special fuel *to* an Indiana destination. In other words, IC § 6-6-2.5-40(g) only applies to shipments diverted for import into, or from export out of, Indiana. However, the post-election removals and the disallowed exports deal with shipments allegedly diverted *from*, not *to*, Indiana destinations. They therefore fall outside the scope of IC § 6-6-2.5-40(g), which as a result is unavailable to the taxpayer as a basis for relief from the parts of the assessments that were made on the post-election removals and the disallowed exports.

IC § 6-6-2.5-40(f) speaks of fuel diverted from its destination state in more general terms than IC § 6-6-2.5-40(g) does. However, it is clear from the above-emphasized reference to refunds in that subsection that IC § 6-6-2.5-40(f) necessarily applies to special fuel on which Indiana special fuel tax was paid prior to shipment. The emphasized language further implies that, since Indiana special fuel tax was paid on the shipment, the diverted fuel was originally destined for or within Indiana and was diverted *from* that destination to a destination outside the state. Specifically, the Department administratively construes IC § 6-6-2.5-40(f) as applying to two subclasses of special fuel shipments. One subclass is made up of shipments that originated out-of-state and which the shipping papers indicated were to be imported to Indiana destinations, but which were diverted to ones outside the state without ever being entered into Indiana. The other subclass consists of shipments that originated in Indiana and for which the shipping papers show Indiana destinations, but which were exported instead of being delivered to those destinations. The post-election removals allegedly fall within the first, and the disallowed exports allegedly fall within the second, subclass. Thus, both by statutory interpretation and process of elimination, if the taxpayer is entitled to any relief at all from the parts of the assessments imposed on the post-election removals and the disallowed exports, it should be based on IC § 6-6-2.5-40(f), not (g). However, because the taxpayer has not paid these parts of the assessments, it cannot file a refund claim or claims to recover them, making it necessary for the Department to address the threshold question of whether to entertain this part of the taxpayer's protest. The answer to that question depends partly on statutory interpretation and partly on the procedural posture of this specific protest.

4. This Protest Is the Only Administrative Remedy Now Available to the Taxpayer to Make Its Diversion Argument.

If the question were purely one of statutory interpretation, the taxpayer would be unable to use this protest to raise the diversion-from-Indiana argument. By specifying the use of the Special Fuel Tax Law's refund claim procedure, IC § 6-6-2.5-40(f) conflicts with the protest and rehearing provisions of IC § 6-8.1-5-1, which is part of the Tax Administration Act, P.L. 61, sec. 1, 1980 Ind. Acts 660, 660-84, codified as amended IC art. 6-8.1 (1993 and 1998) (hereafter "the TAA"). Conflicts between a provision of the

TAA and of a listed tax law (*e.g.*, the Special Fuel Tax Law) are resolved in favor of the latter. IC § 6-8.1-1-6, followed in *Wechter v. Indiana Dep't of State Revenue*, 544 N.E.2d 221, 224 (Ind. Tax 1989), *aff'd and adopted* 553 N.E.2d 844 (Ind. 1990). IC § 6-6-2.5-40(f) therefore controls over IC § 6-8.1-5-1, making a refund claim rather than a protest the appropriate administrative remedy.

The Department will address the taxpayer's diversion-from-Indiana argument in this protest, notwithstanding the existence and applicability of IC § 6-6-2.5-40(f), for two reasons. The first reason is that the taxpayer made a general objection at the beginning of the rehearing process to paying any additional tax and filing a refund claim for that additional payment. It argued that any such claim would be barred *ab initio* by virtue of IC § 6-6-2.5-32(d). That subsection requires that a special fuel taxpayer file its refund claim within three years of the date of purchase of the fuel on which the tax was paid. The argument has some factual foundation to the extent that the Department issued Demand Notices for Payment of the supplemental assessments just after the refund claim period of limitations under IC § 6-6-2.5-32(d) would have expired for the audit period if the taxpayer's untimeliness argument is correct. The Department expresses no opinion on the merits of that argument, but would observe as a general proposition that timely filing of a refund claim is a jurisdictional condition precedent to judicial review of any denial of that claim. *Marhoefer Packing Co. v. Indiana Dep't of State Revenue*, 301 N.E.2d 209, 218-19 (Ind. Ct. App. 1973). The second reason the Department will entertain the taxpayer's arguments is that the Department has not yet promulgated any regulations implementing IC § 6-6-2.5-40(f). Given both of the foregoing possible problems with filing a refund claim, the Department will allow the taxpayer to make its diversion-from-Indiana argument through this protest instead.

5. The Taxpayer Lacks the Standing as a Diverter to Make Its Diversion Argument.

However, the present supplier lacks the necessary standing as a diverter even to make a diversion-from-Indiana argument. As previously discussed in connection with the pre-election imports, none of the present supplier's customers was acting as its agent. The supplier had no control over the customers' movements of the fuel after it was removed from the terminals and each such removal was a sale to the respective customer concerned. Had the supplier complied with IC §§ 6-6-2.5-28(c), -35(a), -35(c), -35(h) and -35(j), the supplier would have required each customer to pay to it the tax on each of its post-election removals and disallowed exports and remitted the customer's tax payment to the Department. The customer, not the supplier, thus would have been the party out of pocket for the Indiana tax, and would also be subject to the risk of double taxation of the fuel by the destination state. To avoid that risk, the customer as payer of the Indiana tax, not the supplier, would have had the right to file a refund claim under IC § 6-6-2.5-40(f). The present supplier cannot raise a defense to the assessment based on acts that only the customers could have performed. The taxpayer would have had that right only if were legitimately diverting, or causing such a diversion of, a shipment of its own fuel from the Indiana destination shown on the shipping paper to an out-of-state destination. (IC § 6-6-2.5-40(f) restricts its refund claim remedy to tax paid on legitimate diversions of fuel from the destination state shown on the shipping paper (*i.e.*, Indiana)).

Not only does the evidence fail to show that the supplier is the owner and legitimate diverter of any of the post-election removals or disallowed exports, but it also fails to show that any of the diversions were legitimate even as to the customers themselves.

6. Diversion Is Irrelevant to the Taxpayer's Liability and Duties as a Supplier.

Even if the present supplier's standing were not an issue, however, neither the law nor the evidence it has submitted would sustain its argument on the merits. Any diversions of special fuel by the taxpayer's customers that may have occurred are irrelevant, both as a matter of law and fact, to whether it had duties *as a supplier* to precollect and remit tax at the time of removal of any such shipment. The events having special fuel tax significance for the taxpayer were not any diversions of fuel from Indiana that its customers may have effected after its respective removals of that fuel from its terminals, but those removals themselves. Every removal was a Type 1 receipt that imposed special fuel tax under IC §§ 6-6-2.5-20 and -28, and duties on the taxpayer under IC §§ 6-6-2.5-35(a), (c) and (i), to collect from the customer and remit tax, on that removal. Those duties were not affected by any diversions of the removed fuel by the customers, over which and whom as previously noted the taxpayer had no control, at later times and to other places than those shown on the shipping papers. The taxpayer's diversion argument would also defeat the collection mechanisms of IC § 6-6-2.5-35 and render that section a nullity. The Department will not interpret a listed tax statute in such a way as to cause that result.

The taxpayer's argument is ineffective under IC § 6-6-2.5-35(i) and (j) in particular. With one exception inapplicable to this protest, IC § 6-6-2.5-35(i) does not qualify the supplier's joint liability for tax on imported special fuel in any way, nor does IC § 6-6-2.5-35(j) qualify a subject supplier's duties to precollect and remit tax on those imports. In particular, neither IC § 6-6-2.5-35(i) nor (j) condition the supplier's liability or duties on the fuel's actual "entry into Indiana" under IC § 6-6-2.5-20, as the taxpayer asserts. IC § 6-6-2.5-35(j) deems special fuel removed from an out-of-state rack to have been removed *in Indiana* to begin with by virtue of the supplier's own choice to be subject to that subsection and the fiction of in-state receipt that such an election creates. As a factual matter, such fuel plainly becomes subject to collection and remittance of the tax *before* it physically arrives in Indiana. Either way, as a matter of legal fiction or fact, the taxpayer's argument fails as to the post-election unreported imports. Moreover, its argument is of no help to it in any case because if a supplier that has subjected itself to IC § 6-6-2.5-35(j) does not precollect and remit the tax, then IC § 6-6-2.5-35(i) makes that supplier jointly liable with the importer for that tax anyway.

Evidence of any diversions of special fuel from Indiana by the taxpayer's customers is thus simply irrelevant to establishing whether or not the taxpayer made a taxable removal of such fuel from a terminal earlier. It is also irrelevant as to whether or not the taxpayer, *as the supplier who received the fuel*, had duties to collect and remit Indiana tax on its removals, or is now liable for having breached those duties. If the taxpayer is of the opinion that the customers' diversions caused it to pay tax to Indiana unnecessarily, those

diversions may be matters for adjustment between the supplier and each respective customer, but they are no legal or factual defense to the Department's assessments.

FINDINGS

The taxpayer's protest is sustained in part and denied in part as to this issue. The protest is sustained as to this issue as to any tax on special fuel that the taxpayer removed from the racks of Terminals 2—4 before September 22, 1994 and sold to Customers A—E. The protest is denied as to this issue as to any tax on special fuel that the taxpayer removed from the racks of Terminals 2—4 and sold to Customers A—E on or after September 22, 1994, the date that the Department received the taxpayer's Form SF-10A.

II. Special Fuel Tax—Imposition—Exports **Tax Administration— Special Fuel Supplier's Duties to Collect/Remit Tax**

DISCUSSION

A. INTRODUCTION

As with the unreported imports, the Department must divide the disallowed exports into two groups in this discussion because the evidence, and to some extent the argument, applicable to each group differs. The first, larger group consists of all of the removals of special fuel from Terminal 1 by the taxpayer and sold to Customers A—E, all of which the taxpayer contends that those customers diverted from Indiana for export. The second, smaller subgroup is made up of certain sales of special fuel by the taxpayer to Customer A, as to which the taxpayer argues in the alternative that Customer A paid the Indiana special fuel tax. The Department will discuss the former group here and the latter group under Issue III below.

B. THE TAXPAYER IS PRESUMPTIVELY LIABLE FOR INDIANA SPECIAL FUEL TAX ON THE DISALLOWED EXPORTS.

As discussed earlier, the main taxable event under the Special Fuel Tax Law occurs when a person "receive[s]" special fuel, as IC § 6-6-2.5-20 defines "received." Under the Department's previous analysis of that definition, the nonbulk removal of undyed special fuel from a refinery or terminal in Indiana falls within that definition and is a Type 1A receipt of such fuel. Such receipt is presumptively subject to the special fuel tax under the Department's previous administrative construction of IC §§ 6-6-2.5-20, -28(a) and -28(b).

Every removal of a disallowed export from Terminal 1 was a Type 1A receipt presumptively subject to imposition of special fuel tax at the rack and for which the taxpayer was liable as a Type 1A recipient. As such, the supplier also was required under IC §§ 6-6-2.5-35(a) and (c) to collect Indiana special fuel tax from the purchaser and remit it to the Department. Exceptions to these duties would have arisen only if the

removed special fuel qualified for one or more of the exemptions under IC § 6-6-2.5-30 which does not require the taxpayer (who is usually the purchaser, not the supplier) to assert by means of a claim for refund.

C. THE UNDYED FUEL EXPORT EXEMPTION AND
ITS EFFECT ON THE SUPPLIER'S LIABILITY FOR AND
DUTIES TO COLLECT AND REMIT SPECIAL FUEL TAX

The only such exemption arguably applicable to this protest is the one found in IC § 6-6-2.5-30(a)(1) for undyed special fuel sold for export (hereafter “the undyed fuel export exemption”). Subsection (a) of 45 IAC § 10-3-1 (1992 and 1996), the regulation that implements this exemption, states that “[s]pecial fuel sold for export or exported from Indiana is a nontaxable transaction.” *Id.* However, one of the threshold requirements to qualify for this exemption is that the claimant be an exporter. IC § 6-6-2.5-10, which has remained unchanged since the Special Fuel Tax Law took effect, defines an “exporter” as being “any person, *other than a supplier*, who purchases special fuel in Indiana for the purpose of transporting or delivering the fuel to another state or country.” *Id.* (emphasis added). The definition thus deprives persons acting in their capacity as suppliers, such as the present taxpayer, of standing to claim the export exemption.

The issue thus cannot be, and is not, whether the supplier is entitled to claim the undyed fuel export exemption of IC § 6-6-2.5-30(a)(1) on the disallowed exports. Instead, the issue is whether or not the taxpayer as supplier was under duties to collect and remit Indiana special fuel tax on each of those transactions. However, whether or not those duties existed did in turn depend on whether Customers A—E each took the actions with respect to each of the disallowed exports that were necessary to claim the undyed fuel export exemption. Each customer was required to take the actions that IC § 6-6-2.5-30(a)(1) specifies, not some other actions, and to do so upon removal of the fuel from the Terminal 1 rack, not at some other time or place. The supplier would not have been relieved of its duties to collect and remit tax by any actual knowledge that it may have acquired by the time of removal (other than through the purchaser's having complied with IC § 6-6-2.5-30(a)(1)) that the customer intended to export the fuel. “The mere knowledge on the part of the seller in Indiana of the intended out-of-state destination of goods sold and delivered in Indiana to a buyer does not convert an intrastate transaction to an interstate transaction[.]” *Bendix Aviation Corp.*, *supra*, 143 N.E.2d at 98. By logical extension, actual knowledge of a diversion of special fuel to an out-of-state destination that the supplier acquired after the sale also cannot convert the transaction into an exempt export and retroactively relieve the supplier of its duties to collect and remit Indiana special fuel tax on the sale. Only the actions which IC § 6-6-2.5-30(a)(1) specifies, taken at the time of removal at an Indiana rack, not later, different actions taken elsewhere, can do that. As with diverted imports, evidence that a party which is not the supplier's agent engaged in such untimely alternate activity is irrelevant to whether or not the supplier had the duties to collect and remit the tax when it removed the fuel from the rack.

IC § 6-6-2.5-30(a)(1) itself reads as follows:

6-6-2.5-30 Exemptions from special fuel tax; provision of export information; refunds

Sec. 30. The following are exempt from the special fuel tax:

(1) Special fuel sold by a supplier to a licensed exporter for export from Indiana to another state or country to which the exporter is specifically licensed to export exports by a supplier, or exports for which the destination state special fuel tax has been paid to the supplier and proof of export is available in the form of a destination state bill of lading.

IC § 6-6-2.5-30(a)(1) is phrased in disjunctive terms and thereby provides a purchaser of undyed special fuel from an Indiana rack that intends to export the fuel with alternate means of qualifying for that exemption. The purchaser may tender proof to the supplier that the purchaser is specifically licensed to export from Indiana to the destination state. (Thus, unlike the situation in determining whether a special fuel transaction is an import, the license status of the party to whom the supplier transfers special fuel can have some bearing on whether a transaction is an export.) If the purchaser is not licensed, or fails to submit proof to the supplier that the purchaser is licensed, to make the export, it may instead pay the supplier the destination state's special fuel tax and have the facility operator issue the purchaser a destination state bill of lading.

However, if the purchaser of the fuel does neither of these things, then the presumption of IC § 6-6-2.5-28(b) as administratively construed that fuel received in Indiana is subject to special fuel tax has not been rebutted. The supplier has received the fuel within the meaning of the Type 1A-receipt clause of IC § 6-6-2.5-20, and is subject to the initial imposition of Indiana special fuel tax under IC §§ 6-6-2.5-28(a) and (c). IC §§ 6-6-2.5-35(a) and (c) in turn mandate the supplier to collect that tax from the purchaser on the removal and remit it to the Department. If the supplier fails to do so, then IC § 6-6-2.5-64(d) subjects that supplier "to a civil penalty equal to the amount of Indiana's special fuel tax in addition to the tax due." *Id.*

D. THE TAXPAYER ALSO LACKS STANDING AS A SUPPLIER TO MAKE ITS DIVERSION ARGUMENT AS TO THE DISALLOWED EXPORTS.

If after leaving the rack a purchaser that paid the Indiana special fuel tax legitimately diverts the fuel to a destination outside Indiana, its remedy (not the supplier's) is to file a claim for refund under IC § 6-6-2.5-40(f), as was discussed above concerning the post-election unreported imports. The Department's observations in that discussion concerning the inappropriateness of a protest as the remedy by which to raise, and the supplier's lack of standing to make, a diversion-from-Indiana argument are incorporated by reference as though fully set out here. However, as regards allegedly diverted exports

in particular, the Department would add that the supplier lacks standing to make a destination diversion argument for the further reason that a person acting as a supplier by definition (*i.e.*, that in IC § 6-6-2.5-10) cannot be an exporter.

E. APPLICATION OF THE UNDYED FUEL EXPORT EXEMPTION TO THE DISALLOWED EXPORTS.

1. Customers C and D

As mentioned in the Statement of Facts, only Customers A, C and D held exporter's licenses throughout the taxpayer's audit period. At various stages of this dispute the taxpayer submitted to the Department copies of certain of its own fuel receipts and invoices issued from Terminal 1 to Customers C and D. The words "[e]xport to [the adjoining state]" or "[e]xport from Indiana" appear on each of these documents. The Board in the original protest abated the assessments on other fuel for which the taxpayer had issued receipts to Customers C and D on which this language appeared. Both administrative consistency and IC § 6-6-2.5-30(a)(1) require the Department to do so on the fuel for which the taxpayer has submitted this additional evidence as well. It is reasonable to infer from the above-quoted language and the circumstance that Customers C and D held exporter's licenses that the taxpayer received timely proof that the customer in question was licensed to export the fuel that the supplier removed from Terminal 1 and sold to that customer. The customer (not the taxpayer as supplier) thereby qualified for the export exemption of IC § 6-6-2.5-30(a)(1). However, by doing so the presumption of IC § 6-6-2.5-28(b) of taxable receipt was rebutted and the taxpayer was relieved of the statutory duties of collecting and remitting tax on that removal that it otherwise would have had to perform.

2. Customers A, B and E

Unlike Customers C and D, however, Customers B and E did not hold exporter's licenses during the taxpayer's audit period. The latter customers thus could not have tendered the taxpayer proof of their status as exporters licensed to export to the adjoining state at the times of their respective purchases from Terminal 1. The fuel receipts and invoices the taxpayer submitted concerning Customer A's disallowed exports do not contain words "[e]xport to [the adjoining state]" or "[e]xport from Indiana" that appear on the records the taxpayer submitted with respect to Customers C and D. Under IC § 6-6-2.5-30(a)(1), there was only one other way for the fuel purchases of Customers A, B and E to have qualified for the undyed fuel export exemption, consisting of two steps. First, the taxpayer as supplier, at the time of each removal from the rack of Terminal 1, would have had to collect the adjoining state's special fuel tax instead of the Indiana special fuel tax from these customers. Second, the supplier would have had to issue each of them for each of their respective shipments a bill of lading or other document on which a destination address in the adjoining state appeared. Nothing appears on the invoices and fuel receipts that the taxpayer has submitted for its sales to Customers A, B and E from Terminal 1 to indicate that it took either of those steps with respect to those removals. The supplier therefore has failed to meet its burden of proof under IC § 6-8.1-5-1(b) that

it the assessment of Indiana special fuel tax on these transactions was wrong, *i.e.* that it had no duties to collect and remit that tax on these removals. It had no reason not to do so, should have done so, and is therefore liable as the supplier for its breaches of those duties.

FINDINGS

The taxpayer's protest is sustained in part and denied in part to the extent that it is based on this issue. The taxpayer's protest as to this issue is sustained as to its sales to Customers C and D from Terminal 1 to the extent that the receipt or invoice that the taxpayer issued for the fuel in question reads “[e]xport to [the adjoining state]” or “[e]xport from Indiana.” The protest is denied as to this issue as to Customers C and D to the extent that the receipt or invoice that the taxpayer issued for the fuel in question does not meet the foregoing criteria. The taxpayer’s protest is also denied as to this issue as to its sales to Customers A, B and E from Terminal 1.

III. Special Fuel Tax—Imposition—Payment of Tax by Purchasing Supplier Special Fuel Tax—Imposition—Intra-Terminal Bulk Transfers

DISCUSSION

A. INTRODUCTION.

It was not necessary for the Department to discuss the taxpayer’s defense that Customer A had paid the tax on the fuel forming the subject of the transactions between them in connection with the issue of the taxpayer’s liability for the tax on the unreported imports. The Department was able to resolve that issue on other grounds, which arose out of and which the Department used to rebut the taxpayer’s “physical entry” argument.

Similarly, an issue that is related to the taxpayer’s payment-by-customer defense arises by implication out of the evidence that the taxpayer has submitted concerning its transactions with Customer A. The specific issue is whether the transactions were tax-free intra-terminal exchanges. However, in contrast to the grounds used to rule on the unresolved imports issue, the present related issue is subsidiary to that which the taxpayer’s defense raises, and does not provide an entirely alternate ground to payment which the Department can use to rule on this issue. Accordingly, the Department will respond in terms of the defense that the taxpayer argued. However, that defense is intertwined with the subsidiary intra-terminal exchange question, and the Department will therefore discuss the latter issue to the extent necessary to rule on the merits of the supplier’s payment-by-customer defense.

B. THE TAXPAYER’S EVIDENCE CONCERNING DISALLOWED EXPORTS BY CUSTOMER A

Both of Customer A’s affidavits assert that it paid the Indiana special fuel tax on the fuel forming the subjects of the transactions between it and the taxpayer on which the

Department assessed tax in the audits. The first affidavit states that Customer A did so in response to a special fuel tax audit by the Department of Customer A for the same period as that covered by the present taxpayer's audits. However, as discussed in the Statement of Facts, the Department's review of Customer A's audit file indicates that the Department's focus in that audit was on Customer A's transactions with a third party, not the present taxpayer. The Department's examination of Customer A's transactions with this taxpayer was at best incidental to Customer A's audit.

Customer A's second affidavit, to the extent that it addresses the present issue, still asserts in relevant part that Customer A paid fuel tax to Indiana on its disallowed exports, and also tries to cure some of the first affidavit's documentary deficiencies. However, one of the documents newly submitted with that affidavit can be read as impliedly supplementing, if not changing somewhat, the taxpayer's legal theory of attack on the parts of the assessments made on the fuel the taxpayer sold to Customer A from Terminal 1. The taxpayer had Customer A submit a copy of its Indiana "Permissive Supplier's Monthly Special Fuel Tax Return" (Form SF-201) for December, 1993, the month in which the transactions involving all of its disallowed exports occurred, with supporting schedules and computer printouts. That documentation includes a Schedule 5x ("Fuel Received From a Licensed Supplier Through an Exchange Transaction for Delivery in Indiana") and a supporting computer printout listing most, but not all, of the disallowed exports of Customer A on which the field auditor assessed tax.

C. THE INTRA-TERMINAL EXCHANGE ISSUE

Exchange transactions fall within the exception to the definition of "received" in IC § 6-6-2.5-20 for "transfers in bulk into or within a terminal in Indiana between registered suppliers[.]" *id.* This exception is similar (but not identical) to that under I.R.C. § 4081(a)(1)(B), which excludes such transactions from liability for the federal fuel manufacturer's excise tax. By submitting Schedule 5x of Customer A's December, 1993 Form SF-201, the taxpayer has therefore impliedly asserted that the transactions between them listed on that schedule were tax-free and that the taxpayer shifted liability for collecting and remitting the tax to Customer A. The taxpayer has also thereby further implied that Customer A ultimately either collected and remitted the tax when it later removed the fuel from the Terminal 1 rack for resale to its own customers, or made another tax-free retransfer of that fuel to another registered supplier. Either way, the taxpayer would have had no duties to collect and remit the tax on the fuel it had sold to Customer A if those sales in fact qualified for the exception for "transfers in bulk into or within a terminal in Indiana between registered suppliers" under IC § 6-6-2.5-20.

D. BOTH THE TAXPAYER AND CUSTOMER A WERE REGISTERED UNDER I.R.C. § 4101.

In its earlier discussion of the Special Fuel Tax Law's treatment of the bulk transfer/terminal system, the Department construed this phrase as requiring that no party to a transfer of special fuel within a terminal in Indiana could be a permissive supplier. All parties to such a transfer must be registered under I.R.C. § 4101 and suppliers as defined

in IC § 6-6-2.5-23. As noted in the Statement of Facts, the taxpayer was a licensed supplier throughout the audit period, and under the definition of “supplier” in IC § 6-6-2.5-23 had to be registered with the IRS under I.R.C. § 4101 to be eligible for that license. Customer A represented on all of its various license applications to the Department during the taxpayer’s audit period that Customer A was registered under I.R.C. § 4101. In addition, the Petroleum Terminal Encyclopedia’s section for the adjoining state lists Customer A as being Terminal 3’s owner and operator, which means that it also would have had to have been registered under I.R.C. § 4101 in order to do so. Thus, both parties to the alleged intra-terminal exchanges were “registered” as used in the phrase “between registered suppliers” in IC § 6-6-2.5-20.

E. THE ALLEGED EXCHANGES DID NOT OCCUR BETWEEN
PARTIES WHO WERE BOTH SUPPLIERS.

The copy of the Customer A’s Schedule 5x of its December, 1993 Form 201 that the taxpayer submitted represents that these transfers occurred within Terminal 1. For the reasons stated in the next paragraph, the Department finds that these transfers were out of Terminal 1, not within it. However, even assuming for the sake of the present discussion that these transfers had occurred within that terminal, they would not have been “between registered suppliers” under IC § 6-6-2.5-20. Customer A did not obtain its supplier’s license until January, 1995, immediately after the end of the taxpayer’s audit period. Customer A was not a licensed supplier, but a licensed *permissive* supplier, during December, 1993, when all of these alleged exchanges occurred. Had these transfers been *into* Terminal 1, they would have fallen within the exception for such transactions from being “received” under IC § 6-6-2.5-20. However, the taxpayer’s evidence represents them as having been made *within* Terminal 1, not into it. Since Customer A was a licensed permissive supplier rather than a licensed supplier at that time, the alleged exchanges therefore did not occur “within a terminal between registered suppliers” as the Department construed that phrase in IC § 6-6-2.5-20 earlier in this letter. The taxpayer therefore received the disallowed exports upon their respective removals at the rack of Terminal 1 as discussed below.

F. THE TAXPAYER DID NOT TRANSFER
THE DISALLOWED EXPORTS TO
CUSTOMER A WITHIN TERMINAL 1.

The preponderance of the taxpayer’s other evidence of its transactions with Customer A, and the lack of any evidence that the latter had an inventory position at Terminal 1 those transactions occurred, also support treating the taxpayer as having received this fuel. The taxpayer’s other evidence consists of the invoices and fuel receipts that the supplier issued to Customer A for, and at the respective times of, these transactions. The taxpayer submitted copies of these records during the preparation of the original Letter of Findings and the supplemental audit in this protest. All of the invoices and fuel receipts for transactions that also appear on Schedule 5x of Customer A’s December, 1993 Form SF-201 are dated the same day as the one given on that schedule. However, Customer A repeatedly represented on its various license applications during the taxpayer’s audit

period that it was not operating any terminal in Indiana, and did not list Terminal 1 as a terminal in which it was leasing any space. There is thus no reason for the Department to believe that Customer A then had an inventory position in Terminal 1 to which any intra-terminal exchanges could have been transferred on the taxpayer's terminal books. It is therefore more logical for the Department to infer from the invoices and fuel receipts that the taxpayer sold the fuel in question to Customer A by removing the fuel at the rack of Terminal 1, rather than exchanging it within that terminal as Customer A reported.

**G. THE TAXPAYER DID NOT TRANSFER THE
DISALLOWED EXPORTS TO CUSTOMER A IN BULK.**

The fact that the invoices and fuel receipts also indicate that Customer A picked up each shipment in transport that it owned or that of a common carrier for which it provided bolsters this inference. As the Department discussed earlier, transportation by motor vehicle does not meet the definition of "bulk transfer" in Treas. Reg. § 48.4081-1(b), which requires the transfer to be by pipeline or vessel. *Id.* Admittedly, the invoices also show that the taxpayer reduced the balance due by the respective amounts of the corresponding federal tax and Superfund charge. However, that circumstance alone is not enough to corroborate that the transactions were intra-terminal exchanges, given the explicit references in both the invoices and the fuel receipts to pickup by Customer A's equipment and the resulting inferences that removals at the rack occurred.

H. CONCLUSION

The taxpayer's sales of special fuel to Customer A from Terminal 1 therefore do not qualify for the above-quoted exception to the definition of "received" under IC § 6-6-2.5-20. In the terms of that exception, the transfers were not "between registered suppliers[,] *id.*, they were not "into or within a terminal in Indiana[,] *id.*, and they were not they "transfers in bulk[,] *id.*, as Treas. Reg. § 48.4081-1 defines "bulk transfer," *i.e.* transfer by pipeline or marine vessel. The taxpayer's duties to collect and remit the tax on that fuel did not shift from it to Customer A. The taxpayer, not Customer A, was the supplier who removed the fuel from the rack of Terminal 1. It should have collected the tax from Customer A on each of those removals and remitted it to the Department. It did not, and it has also never submitted any original business records of Customer A indicating that it paid any of the tax that the taxpayer should have collected and remitted. The taxpayer thus has failed to meet its burden of proof under IC § 6-8.1-5-1(b) that Customer A paid the tax on the fuel sold to it from Terminal 1, and is therefore liable to the Department for not having collected and remitted that tax itself.

FINDING

The taxpayer's protest is denied as to this issue.

IV. Tax Administration—Penalties--Special Fuel Tax Law

DISCUSSION

The field auditor and the Board assessed a flat ten percent (10%) negligence penalty pursuant to IC § 6-8.1-10-2.1(b). However, IC § 6-6-2.5-63(d) states that “[a] person who negligently disregards any provision of this chapter is subject to a civil penalty of five hundred dollars (\$500) for each separate occurrence of negligent disregard as determined by the commissioner.” In addition, as noted under Issue II above, with respect to removals from in-state terminals for export in particular, IC § 6-6-2.5-64(d) subjects the supplier “to a civil penalty equal to the amount of Indiana’s special fuel tax in addition to the tax due.” *Id.* The latter statute does not specify any standard of culpability for the supplier, which leads the Department to construe IC § 6-6-2.5-64(d) as a strict liability penalty. The measures of the penalties in IC §§ 6-6-2.5-63(d) and -64(d) and 6-8.1-10-2.1(b), and the standards of culpability in IC §§ 6-6-2.5-64(d) and 6-8.1-10-2.1(b), thus conflict. The measure of the penalty in IC § 6-6-2.5-63(d), and the strict liability standard of culpability in IC § 6-6-2.5-64(d), therefore control over those in IC § 6-8.1-10-2.1(b) by operation of IC § 6-8.1-1-6 and *Wechter*, both of which the Department discussed under Issue I above. The imposition of negligence penalties on the post-election unreported imports at a rate of ten percent (10%) of the total assessments, and the imposition of penalties on the disallowed exports in an amount less than the Indiana special fuel tax due, were therefore erroneous. Instead, any penalty assessed for each negligent failure of the taxpayer to collect and remit tax should have been at the rate of five hundred dollars (\$500) for each post-election unreported import, and in the amount of the Indiana special fuel tax on each disallowed export. “Where a statute creates a new offence and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes.” *Farmers’ and Mechanics’ Nat’l Bank v. Dearing*, 23 L.Ed. 196, 199 (U.S. 1875).

IC § 6-8.1-10-2.1(d) and 45 IAC § 15-11-2(c), authorize the Department to waive negligence penalties if the taxpayer can show that its noncompliance is the result of reasonable cause and not negligence. Title 45 IAC § 15-11-2(b) defines “negligence,” while 45 IAC § 15-11-2(c) sets out the standard for and factors relevant to determining the existence of “reasonable cause.” However, these authorities are inapplicable under IC § 6-6-2.5-64(d), which does not specify any standard of culpability as a basis for imposing the penalty thereunder. On the other hand, IC § 6-6-2.5-63(d) does not conflict with IC § 6-8.1-10-2.1(d) and 45 IAC § 15-11-2(c) regarding the standard of culpability. It is therefore necessary to read IC § 6-6-2.5-63(d) together with these other provisions to determine whether reasonable cause exists to abate the penalties on the post-election unreported imports. Applying IC § 6-8.1-10-2.1(d) and 45 IAC § 15-11-2(c), none of facts that the taxpayer has recited concerning this issue is “reasonable cause” for its actions such as to justify abating the penalties entirely as to those receipts. The taxpayer points to its payment and compliance histories and its cooperation in the audits as facts supporting abatement of the negligence penalties assessed against it. However, as noted in the Statement of Facts, there is nothing in the evidence explaining why the taxpayer

failed to collect special fuel tax from Customers A—E and remit to the Department the special fuel tax on the transactions for which the taxpayer had duties to do so.

This is not to imply, however, that the taxpayer had duties to collect and remit tax on all special fuel assessed in this audit. For the reasons discussed under Issue I above, the taxpayer had no duties to collect and remit tax on the removals of unreported imports from Terminals 2, 3 and 4 that occurred before September 22, 1994. As discussed there, the Department did not receive the taxpayer's Form SF-10A electing pursuant to IC § 6-6-2.5-35(j) to precollect and remit tax on all removals of special fuel from its out-of-state terminals destined for Indiana until that date. The taxpayer did not subject itself to, and had reasonable cause not to perform, those duties before that date. Similarly, for the reasons discussed under Issue II above, the taxpayer was under no duties to collect and remit special fuel tax on its sales to Customers C and D from Terminal 1. The Department cannot hold the taxpayer negligent in fulfilling duties it did not have. However, for the respective reasons given as to the parts of the assessments as to which the Department has denied the taxpayer's protest, the taxpayer did have those duties as to all other fuel assessed in this audit. As to those fuel shipments the taxpayer's penalty protest is denied, subject to the adjustment of the amount of penalty for the reasons the Department gave above.

The total dollar amount of the new penalty exceeds the taxpayer's old penalty. The Department could assess a new penalty up to the combined total dollar amounts of the original Notices of Proposed Assessment, and reserves the right to do so on future assessments. However, in this protest it has elected to exercise administrative discretion to cap the new penalty due on the present assessments at that of the old penalty due to the newness of the statute. In its second supplemental audit of this taxpayer the Audit Division is to reassess these penalties first on the disallowed exports, then on the post-election unreported imports, until it approaches as nearly as possible the amount of the old penalty.

FINDINGS

The taxpayer's protest is sustained in part and denied in part to the extent that it is based on this issue. The taxpayer's protest as to this issue is sustained as to all alleged unreported special fuel imports that occurred before September 22, 1994 and as to all fuel the taxpayer sold to Customers C and D from Terminal 1 for which the Department sustained its protest under Issue II above. The taxpayer's protest is also sustained to the extent that the measures of the negligence penalties used by the Audit Division were incorrect.

The taxpayer's protest is denied as to this issue to the extent that it seeks a full abatement of the negligence penalty. The denial applies in particular as to all unreported special fuel imports that occurred on or after September 22, 1994 and as to all disallowed special fuel exports, regardless of the date on which they occurred, other than those by Customers C and D described above.

The Audit Division will conduct a second supplemental audit of, and in due course issue a Summary of that audit to, the taxpayer consistent with this letter's findings. The Department will also issue amended Demand Notices for Payment consistent with the results of that audit.

SLK/MR-992710